No. 80-1083

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In the Supreme Court of the United States

OCTOBER TERM 1980

BARNEY'S CLUB, INC.
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

SPARKS NUGGET INC.
d/b/a JOHN ASCUAGA'S NUGGET
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether there is a conflict between the refusal to bargain decision sought here to be reviewed and decisions on the same matter of federal law of other Courts of Appeals.

2. Whether the Court below was in error in holding that the National Labor Relations Board (the Board) may ignore federal law and *N.L.R.B. v. Local U. 103, Int.'l Ass'n. etc.*, 434 U.S. 335 (1978), and for policy reasons establish a presumption based upon two other presumptions.

3. Whether the Board may establish a rebuttable presumption to which is given mere lip service and which in actual practice as applied by it is an absolute and irrebuttable presumption resulting in denial of due process.

4. Whether the Board and the Court of Appeals were in error in holding that Petitioners' no-solicitation rules are too broad under the National Labor Relations Act (the Act), notwithstanding the overriding interests of the State of Nevada in regulating its gaming industry where the State gaming regulations create "special circumstances" which make Petitioners' broad rules permissible under the Act.

5. Whether the Board and Court of Appeals erred, creating a conflict among the Courts of Appeal, by failing to consider alternative means of communication by the Union which would lessen the degree of "special circumstances" needed to uphold Petitioners' no-solicitation rules.

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The Petitioners, BARNEY'S CLUB, INC. (Barney's) and SPARKS NUGGET, INC. d/b/a JOHN ASCUAGA'S NUGGET (Sparks), respectively, pray that a Writ of Certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Ninth Circuit.[1] Judgment as to Barney's was entered on August 18, 1980. Judgment as to Sparks was entered on September 12, 1980.

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1. Hotel-Motel-Restaurant Employees and Bartenders International Union, Local 86 AFL-CIO intervened in those proceedings.

OPINION BELOW

The opinion of the Court of Appeals is reported at 623 F.2d 571. A copy of the opinion appears in the Appendix hereto. The decisions and orders of the Board are reported at 227 NLRB 414 (Barney's) and 230 NLRB 275 (Sparks). Copies of those decisions and orders appear in the Appendix hereto.

JURISDICTION

The opinion of the Court of Appeals was filed on May 27, 1980. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on July 14, 1980. A copy of that order appears in the Appendix hereto. On August 18, 1980 judgment was entered as to Barney's; and judgment was entered on September 12, 1980 as to Sparks. Justice Rehnquist on November 7, 1980 and November 26, 1980 granted timely applications by Barney's and Sparks for filing their petitions to January 2 and 4, 1981, respectively. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C., Constitution, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 29:

§ 158(a)(1): It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

§ 158(a)(3): It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;...

§ 158(a)(5): It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . .

§ 160(b): Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place fixed, nor less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States . . .

STATEMENT OF THE CASE

From 1960 to December 9, 1974, Sparks was a member of a multi-employer group known as the Reno Employers Council (Council). From an unspecified date in the period between 1963 to 1965 through August 30, 1974, Barney's was a member of the Council. By August 30, 1974 and December 9, 1974, Barney's and Sparks respectively had withdrawn their memberships from the Council. During their membership, each Petitioner was represented by the Council in collective bargaining and were parties to the Council's multi-employer collective bargaining agreement with Local 86 of the Hotel-Motel-Restaurant Employees International Union (the Union). Thereafter, each Petitioner's status was that of a single employer unit.

Based upon certain information which came to their respective attention, the managers of each Petitioner had a good faith doubt as to whether the Union continued to represent a majority of their employees. This prompted the withdrawal from the multi-employer unit.

There had never been a representation election, either in the larger unit or the individual units. By letter, on the dates mentioned, each Petitioner informed the Union of its withdrawal from the Council and the multi-employer unit, and that they were terminating the existing collective bargaining agreement effective as of its end of the term. Subsequently, the Union's attorney wrote each Petitioner requesting that individual bargaining take place. Petitioners' attorney responded on behalf of each that they had a genuine doubt that the Union represented an uncoerced majority in an appropriate unit and urged the Union to petition for an election to demonstrate whether in fact they represented a majority. Petitioners, through their attorney, also offered to cooperate to expedite an election.

The response of the Union was to file a refusal to bargain and other charges against each Petitioner.

Thereafter, a complaint issued and each matter was heard before an Administrative Law Judge. Barney's was heard by Judge Taplitz and the Sparks was heard by Judge Gilbert. Before these trials and before the Regional Director issued the complaints, Petitioners filed petitions for separate unit elections. The Regional Director refused to process them on the ground that the charges blocked such elections. The Union refused to withdraw the charges or to proceed to an election.

In Barney's Judge Taplitz concluded that by refusing to bargain and by promulgation and enforcement of its no-solicitation rules, Barney's violated the National Labor Relations Act (the Act) [29 U.S.C. §§ 158(a)(1) and (5)]. In Sparks, Judge Gilbert concluded that by refusing to bargain, by promulgation and enforcement of its no-solicitation rules, creation of an employees council, unilateral insurance program changes and disciplining employees Launius and Dyer, Sparks had violated the Act. [29 U.S.C. §§ 158(a)(1), (2), (3) and (5)]. Both judges' refusal to bargain findings were based upon a presumption that the Union continued to represent a majority of each Petitioners' employees by reason of the multi-employer unit and that by derivation the presumption applied to the new single employer units. Each judge concluded that Petitioners had not rebutted the presumption, notwithstanding the plethora of evidence Petitioners presented or attempted to present to rebut the so-called rebuttable presumption. Both judges also found Petitioners' no-solicitation rules too broad and refused to apply the "special circumstances" doctrine which would have validated such rules under the Act.

A three-member panel of the Board affirmed Judge Taplitz in Barney's. A different three-member panel affirmed Judge Gilbert in Sparks, but modified his determinations as to the Sparks employees council. The Court below enforced the Board orders in both cases with modification regarding the no-solicitation rules. Review and reversal of the erroneous findings of both judges, the Board and Court below is sought by Petitioners regarding their no-solicitation rules and their refusal to bargain with the Union.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts with the Decisions of Other Courts of Appeal and this Court as to the Application of the Presumption of a Union's Continuing Majority Status.

The decision of the Court below is in conflict with the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits as well as this Court.

The Court below concedes:

> "We recognize the force of [petitioners] contention that the Board has accorded too much weight to the presumption in these cases. *This issue involves an important and difficult question which is of current national interest in the labor relations field.* [Petitioners] cite cases in other circuits which may have found the presumption rebutted upon similar or even weaker evidence than was presented in these cases. (fn.) [The footnote cites the cases from the eight other Circuits.]" (Emphasis added. App. pp. 14-15)

Further, the Court below "accept[ed] *arguendo* that a conflict exists on the issue" (App., p. 15).

Petitioners urge, as do petitioners in companion Case No. 80-660 pending before this Court, that *N.L.R.B. v. Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget* and *Nevada Lodge*, 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979) and *Sahara-Tahoe Corp. v. N.L.R.B.*, 581 F.2d

767 (9th Cir. 1978), *cert. denied,* 442 U.S. 917 (1979), should not control this Court's determination. The instant Petition discloses that as opposed to the *Tahoe Nugget, Nevada Lodge* and *Sahara-Tahoe* decisions, the instant cases involve separate issues.[2] The conflict conceded by the court here was not conceded in those earlier decisions. This "important and difficult question . . . of current national interest" warrants the careful attention and consideration of this Court.

In adopting the Board's presumption approach, the Court below ignored its own precedent, *Ariasi v. Orient Ins. Co.,* 50 F.2d 548, 552-554 (9th Cir. 1931) in which the Court held that a presumption is not evidence and has no probative force. Yet, the Court below based its approval of the Board's hydra-headed presumption on policy considerations. Appendix p. 15. Policy considerations cannot override the law. The principal reason courts recognize a presumption is probability. *Ref-Chem Company v. N.L.R.B.,* 418 F.2d 127, 130-131 (5th Cir. 1969); McCormick, Evidence, § 309, p. 641. Even if policy considerations are to control then this Court's decision in *N.L.R.B. v. Local U. No. 103, International Ass'n of Bridge, Structural and Ornamental Iron Workers, AFL-CIO,* 434 U.S. 355, 54 L.Ed. 586, 98 S.Ct. 65 (1978) should prevail. Clearly, the lower court and Board determinations are in conflict with that case. In *Local U. No. 103* this Court upheld as "prevailing" the federal:

> "statutory policy that a union should not purport to act as collective bargaining agent for all unit employees, and may not be recognized as such *unless it is*

2. Justice White would have granted certiorari in *Tahoe Nugget* and *Nevada Lodge.* 442 U.S. 921. Further, several cases cited by the lower court here were not decided at that time. See, e.g., *W & W Steel v. N.L.R.B.,* 599 F.2d 934 (10th Cir. 1979).

the voice of the majority of employees in the unit" 434 U.S. at 344 (Emphasis added).

Here, the "voice of the majority" has been silenced by the Board.

The evidence which the Board, with Court approval, ignored included: (1) that the Union through its trustee publicly stated the Union represented only 20% of the employees in the Tahoe-Reno area, (2) statements by employees that they were dissatisfied with the Union, (3) the Union mounted a desperate membership drive while they were demanding continuing recognition, (4) high employee turnover, (5) reports of employees dissatisfaction with the Union, (6) reports of the Union's inactivity, (7) no dues checkoff, (8) low level of membership among Petitioners' employees, (9) there never had been a representation election, (10) the Union had never been certified, (11) admissions by the Union's representative of the Union's lack of support, and (12) the change from a multi-employer unit to a single employer unit. (App. pp. 57-60; 122-126) In Barney's the Union's ex-president Mr. Staff testified that the Union's membership was decreasing in 1974. Further, Staff testified that none of its members or employees of Barney's or any Lake Tahoe establishment attended a meeting of the Union in the spring of 1974 regarding the expiring contract and decreasing membership (App. pp. 57-60).

In *N.L.R.B. v. Alvin J. Bart and Co.*, 598 F.2d 1267 (2nd Cir. 1979) the Second Circuit rejected the Board's use of the presumption of majority status in factual circumstances substantially weaker than those relied upon by the Petitioners here. The Union had prevailed in a Board conducted election. After almost two years of bargaining without agreement, the company withdrew recognition. A supervisor circulated a petition among three-fourths of the em-

ployees, stating that they did not want the union to have their names and addresses. The company then refused to provide the union with the names and addresses of employees and unilaterally granted substantial wage increases. Despite these Board findings, the Court found that the company had a "serious good faith doubt of the union's majority." In so ruling, the Court relied upon the closeness of the vote, the large turnover in employees, and a statement by a union official of the lack of support from employees. Here, each Petitioner relied on factors similar to those in *Alvin Bart,* as well as several additional factors.

In *W & W Steel Co. v. N.L.R.B.,* 599 F.2d 934 (10th Cir. 1979), the situation is on all fours with the instant cases. Here, the Petitioners properly withdrew from a multi-employer unit and each became a separate, independent unit. In *W & W Steel,* the employer bought a single plant which was part of a multi-plant unit. It questioned the union's majority status in the single plant. The union and the Board took the position, as in the instant cases, that the union's majority in the single plant was presumed to exist because the union had been certified as the bargaining representative following an election in the multi-plant unit. The Tenth Circuit found the employer had a reasonable doubt of the union's majority status and denied enforcement of the Board's bargaining order. The Court pointed out that the election in the multi-employer unit had taken place two years and seven months before the employer's takeover of the plant. In the instant cases, there never was an election in any unit. Each Petitioner here joined an employer association many years ago and by reason thereof automatically became a party to a multi-employer contract between that association and the Union.

Even the dissent in *W & W Steel* recognizes the conflict among the circuits "acknowledg[ing] that this presumption

has not received universal acclaim", and cites *N.L.R.B. v. Tahoe Nugget, Inc.*, 584 F.2d 293, n. 4, (9th Cir. 1978), which the Court below relied on principally to summarily enforce the Board orders. The majority in *W & W Steel* place the Tenth Circuit with the Second, Fourth, Fifth, Sixth, Seventh, Eighth and District of Columbia Circuits, and contrary to the Ninth, holding that a Board-created presumption does not rise to the level of substantial evidence.

The Fifth Circuit in *N.L.R.B. v. Randle-Eastern,* 584 F.2d 720 (5th Cir. 1978) held, denying a bargaining order:

> "The Company need not have conclusive proof that a majority of the employees do not support the Union . . . . The Board's determination otherwise rested on presumptions we deem inapplicable, on the rejection of inferences we consider permisible, and on an assumption that Union's loss of support, if any, [was based on factors] we have determined to be entirely lawful." at 729-730.

The Sixth Circuit in *N.L.R.B. v. Richard W. Kaase Company,* 346 F.2d 24 (6th Cir. 1965), in dealing with the presumption of a union's continuing majority status, held that withdrawal from a multi-employer unit invalidated the presumption. The Court said there could be no presumption of continuance of a union's majority status as to a single employer after a year following certification of the union in a multi-employer election of which the employer had been a part. The Court held that before the Board could find the employer in violation of the Act by its refusal to bargain, it must find that at the time of the refusal the union in fact enjoyed a majority status. This burden of proof, said the Court, was upon the General Counsel. It was there stated (at 31):

> . . . the ambiguity inherent in the multi-employer election here relied on vitiates its efficacy to prove a majority as to any single employer. Before the con-

> tinuance of the fact of majority support can be presumed, the original existence of that fact must be established.

In *Ingress-Plastene, Inc. v. N.L.R.B.*, 430 F.2d 542 (7th Cir. 1970), denying enforcement, the Seventh Circuit in considering the objective considerations which there led the employer to question the union's continuing majority status, said (at 547):

> Although the Board attacks each of the reasons advanced by the company in support of its good faith doubt of the union's majority status, the company does not rely on any one reason alone, but rather on all as a whole. We think the entire record, including evidence against the Board's position as well as in favor of it . . . supports the company's position.

Similarly, *Star Mfg. Co., Div. of Star Forge, Inc. v. N.L.R.B.*, (7th Cir. 1976) 536 F.2d 1192, 1196. See also *Bellwood General Hospital v. N.L.R.B.*, ... F.2d ...., (7th Cir. 1980) [No. 79-1818 decided Aug. 11, 1980] where the Court denied enforcement of a Board refusal to bargain order where the employer showed evidence of good faith doubt shifting the burden to the General Counsel, and the General Counsel could not establish the union's majority status.

The Eighth Circuit in *National Cash Register Company v. N.L.R.B.*, 494 F.2d 189 (8th Cir. 1974) reversed a finding of refusal to bargain and denied enforcement, holding the employer on the collective basis of four factors could raise a question as to the union's majority status.

The District of Columbia Circuit in accord with the Second, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits, held an employer who relied upon the cumulative effect of multiple objective considerations, properly raised a good faith doubt as to the union's majority status. *Lodges*

1746 & 743, Int. Ass'n. of Mach. & Aero. Wkrs. v. N.L.R.B., 416 F.2d 809 (D.C. Cir. 1969).[3]

The Board's Derivative Presumption Is Contrary to Federal Law, Labor Policy and Is Impermissible.

The Board in the instant cases adopted its earlier fashioned so-called derivative presumption, based on the erroneous rationale of the Judge Taplitz, whose brainchild it was:

> However, I believe that the presumption of continued majority flowing from the multi-employer contracts requires a *derivative presumption* of the Union's majority status which is applicable to each of the employer-members of the multiemployer bargaining unit separately. *Jim Kelley's Tahoe Nugget*, 227 NLRB 357, 363 (1976); *Nevada Lodge*, 227 NLRB 368, 374 (1976). [Emphasis added]

Dissenting Board member Walther attacked this novel and legally contrary approach, stating:

> I take issue with my colleagues' conclusion that the presumption of majority status flowing from the contract in the multi-employer unit survives Petitioners' timely withdrawal from that unit. By a process resembling alchemy, my colleagues have concocted the existence of majority status with only the thinnest support in legal reason and have, in complementary fashion, ignored valid distinctions between the presumptions applicable to single-employer and multiemployer units.
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3. See also *N.L.R.B. v. Nu-Southern Dyeing & Finishing Inc.*, (4th Cir. 1971) 444 F.2d 11, where the Board refused to consider an anti-union petition signed by a majority of employees on the ground that the anti-union petition was the result of the employer's 8(a)(1) violations. The Court held that there were factors other than the anti-union petition, which when viewed in their combined effect, established that the company "possessed a good faith doubt of the union's majority status at the time of the refusal to bargain" (at 16).

> [C]iting cases which deal with the presumption of majority status in single-employer units, construct two entirely distinct and severable presumptions which in turn give birth to yet a third presumption. Starting with (1) a valid presumption of majority status in the multiemployer relationship, they turn back, and (2) interweave a second presumption of former majority status in the single-employer unit based upon the 10(b) prohibition against finding conduct which occurred years ago to be unlawful. From the interweaving of these two presumptions the majority manages to conceive yet a third presumption of current majority status in the single-employer unit which otherwise has no basis in fact or in logic. While I do believe that the Board can and should base violations of Section 8(a)(5) upon legitimate legal presumptions, a violation predicated upon a presumption raising not out of fact but out of the intermarriage of two other presumptions is, in my view, not a proper basis upon which to establish a violation. *It must never be forgotten than an 8(a)(5) finding effectively prevents employees from exercising their right to a free choice in the selection of a collective-bargaining representative—a right these employees have never had an opportunity to exercise. Jim Kelley's Tahoe Nugget,* 227 NLRB at 358; *Nevada Lodge,* 227 NLRB at 368. (Emphasis added)

Early on this Court held that a presumption cannot be built upon another presumption. *U.S. v. Ross,* 92 U.S. 281, 23 L.Ed. 707 (1876); *Manning v. Insurance Co.,* 100 U.S. 693, 698 (1880); *Looney v. Metropolitan R. Co.,* 200 U.S. 480, 26 S.Ct. 303, 306 (1906). Since then many Courts of Appeals have so similarly held. *Otis Elevator Company v. Yager,* 268 F.2d 137, 144 (8th Cir. 1959); *Smith v. Fidelity Casualty Company of New York,* 261 F.2d 460, 462 (5th Cir. 1968); *J. W. Ringrose v. W & J Sloane,* 266 F.2d 402, 404

(E.D. Pa., 1920), affd. 272 F. 445 (3rd Cir., 1921); *Smith v. Pennsylvania R. Co.*, 239 F. 103, 104 (2nd Cir. 1917); and *Hall v. Atchison, Topeka & Santa Fe Railway Company*, 349 F.Supp. 326, 330 (D. Kansas, 1972).

The Board here has gone even beyond basing a presumption upon a presumption. As Board member Walther points out, the Board has given "birth to yet a third presumption." 227 NLRB at 358 and 368. The Board's entire case and its conclusions, which the Court below followed, rest upon a presumption upon a presumption upon a presumption. The Board and the Court below treated its triple headed presumption as evidence. Without it, the Board had no basis for its conclusion.

The Board's Presumption Is One of Irrebuttable Force and Constitutes a Denial of Due Process.

Petitioners sought to introduce evidence from the Board and the Union which would demonstrate that the Union did not in fact represent a majority of their respective employees. The Board rejected this evidence and the Court summarily affirmed the Board on this issue but for different reasons.

Through Board agent Sargent, who had reviewed the Union's records and informed Petitioners' counsel the Union's charges would be dismissed, Petitioners sought evidence of the Union's actual loss of majority. The judges and Board rejected such attempts but the Court concluded the judges rulings were erroneous. (App. 11). Yet, the Court concluded such error was harmless because Sargent's evidence was privileged. (App. 11-12)

Through Union agent Lawrence, Petitioners sought access to the Union's records to determine the existence of any

majority status. The Board refused access or any related questioning, the Court disagreed in part, stating:

> "We affirm the Board's decision, but on a different basis. The Board cited *Retired Persons Pharmacy v. NLRB,* 519 F.2d 486, 491 (2d Cir. 1975), for the proposition that union membership is irrelevant to the determination of a union's majority status. We do not agree. It is true that in a right-to-work state an employee may choose not to join a union, but, nevertheless, desire union representation. However, this observation does not render union membership irrelevant to a determination of whether an employee had a reasonable doubt of the union's majority or whether the union in fact lacked majority support. Union membership, even in a right-to-work state, is some indication of union support, though it may be only marginally relevant." [Citations omitted] (App. pp. 12-13)

Notwithstanding this analysis, the Court, by sheer speculation, concluded that even with such evidence which was exclusively controlled by the Union, "the presumption would not have been rebutted" (App. p. 13) by Petitioners.

This reasoning is plainly wrong. The Board is bound to follow the "rules of evidence applicable to district courts" (29 U.S.C. 160(b)). The Board, with Court approval here, has prevented Petitioners from submitting any evidence making the so-called rebuttable presumption conclusive in application and impermissably shifting the burden of proof to Petitioners.

Rule 301 of the Federal Rules of Evidence provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes upon a party against whom it is directed the burden of going forward with the evidence to rebut or meet the presumption, *but does not shift*

> *to such party the burden of proof in the sense of the risk of nonpersuation, which remains throughout the trial upon the party upon whom it was originally cast.* [West's 1979 ed. p. 210, (Emphasis added)]

In *Automated Business Systems v. NLRB.*, 497 F.2d 262 (6th Cir. 1974) denying enforcement of a Board bargaining order based upon the presumption of continuing majority status the Court held at 271:

> The Board would not permit the Company to introduce evidence regarding the number of cards filed in support of the decertification petition. *Thus the Board puts the burden of proof on the employer and then denies it the means of meeting its burden. We cannot accept this procedure.* (Emphasis added)

But the Board and the Court below have denied the Petitioners access to evidence bearing on the Union's majority status and imposed an insurmountable burden of proof on each Company.[4]

In defining administrative due process, this Court said in *Hormel v. Helvering*, 312 U.S. 552, 560, 61 S.Ct. 719, 723 (1941):

> Congress has entrusted the Board with exclusive authority to determine disputed facts. Under these circumstances we do not feel that petitioner should be foreclosed from all opportunity to offer evidence before the Board on this issue...

Despite this Court's mandate, Petitioners here were foreclosed by the Board's rejection of their proffered evidence and by the Board's application of its presumption, which

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4. Each Company, under the Freedom of Information Act (5 U.S.C. § 551, *et seq.*) sought production of documents from the Board bearing on this. The Board refused. For a history of these attempts by each Company to obtain such information, see *Harvey's Wagon Wheel, Inc. v. N.L.R.B.*, 550 F.2d 1139 (9th Cir. 1976).

made the presumption one of "irrebuttable force." This brings into play the issue of due process. The Court below, in an earlier decision, citing with approval this Court's opinion in *Hormel v. Helvering, supra,* stated in *N.L.R.B. v. Heyman,* 541 F.2d 796 (9th Cir. 1976) at 801.

> As a statute creating a presumption which operates to deny a fair opportunity to rebut would not afford due process . . . a Labor Board presumption to the same effect would also suffer shortcomings.

Also in *Heyman, supra,* the Court below held (at 801):

> . . . by coupling § 10(b) with the presumption the Labor Board would create an irrebuttable presumption having the substantive law effect that was rejected in *Local Lodge.* [*Local Lodge No. 1424 v. N.L.R.B.,* 362 U.S. 411 (1960).]

This Court examined the matter of an irrebutable presumption, hence one of substantive law, in *Manhattan General E. Co. v. Commissioner of Int. Rev.,* 297 U.S. 129, 56 S.Ct. 397 (1936) and declared (297 U.S. at 134):

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress . . .

From the Union ex-president's admissions of lack of majority status, its trustee's public concessions that "less than 20 percent of the Reno-Tahoe area is unionized" with 11 other areas of evidence disclosing the clear lack of Union majority status to Petitioners' unsuccessful attempts to produce documents and other evidence from the Board and Union of further support to the conclusion that the Union lacked any majority status, Petitioners met a stone wall.

The result was a conclusive presumption created by Board fiat and adopted by the Court below in contravention of federal labor law, federal evidence rules and fundamental rights of due process. By this conclusive presumption, upon which the Union's unfair labor practice charges were solely based, the Board permitted such charges to block Petitioners' attempts for single-union elections. The statutory right of an employer to seek an election under Section 9(c) of the NLRA [29 U.S.C. § 159(c)] was abrogated here by such Board fiat and the lower Court's approval.

This result is diametrically opposed to the Congressional purpose of Section 9(c), "which gives [the employer confronted with a claim for recognition or a claim of majority support] the right to go to the Board and say, 'I want an election. I want to know who is the bargaining agent for my employees.'" 93 Cong. Rec. 3838 (1947) (Remarks of Senator Taft). Accord, *Linden Lumber Division, Summer & Co. v. N.L.R.B.*, 419 U.S. 301, 308, 95 S.Ct. 429, 433 (1974). In *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918 (1969), this Court emphasized that the most traveled route for a union to obtain recognition as the exclusive bargaining representative:

> . . . is through the Board's election and certification procedures under § 9(c) of the Act [29 U.S.C. § 159 (c)]
>
> • • •
>
> The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory *indeed the preferred—method of ascertaining whether a union has majority support.* (Emphasis added.) (395 U.S. at 602)

In short, the presumption abrogates the Petitioners' statutory right, to paraphrase Senator Taft, "to know who is the bargaining agent for [their] employees."

Special Circumstances Exist in the Nevada Gaming Industry Which Require Broad No-solicitation Rules and Make Such Rules Permissible Under the National Labor Relations Act.

It is settled that while the Board may establish certain presumptions regarding the validity of no-solicitation rules, special circumstances may exist in an industry which overcome the presumption that certain no-solicitation rules are illegal. *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793, 65 S.Ct. 982 (1945). Thus, special needs associated with maintaining "production or discipline" may support the establishment of a broad no-solicitation rule in certain industrial settings. *Peyton Packing Company*, 49 NLRB 828, 844, cited with approval in *Republic Aviation Corporation v. N.L.R.B., supra*, at 803 n. 10. Additionally, the Board and the courts have recognized the appropriateness of special broad rules regarding no solicitation by employees in retail establishments, *May Department Stores*, 59 NLRB 976 (1944), enforced as modified, 154 F.2d 533 (8th Cir.), *cert. denied*, 329 U.S. 725 (1946), and in certain health care operations. *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150 (1976); *N.L.R.B. v. Beth Israel Hospital*, 437 U.S. 483, 98 S.Ct. 2463 (1978). The Court below recognized but failed to apply these principles. (App., pp. 15-19)

Petitioners submitted to the Board and Court of Appeals, below, evidence that the Nevada gaming industry requires a specialized set of rules regarding in-house employee solicitation because State rules mandate that gaming operators maintain strict control over, and security in, their establishments. Neither the Board nor the Court of Appeals, however, addressed these "special circumstances" which Petitioners showed exist in the gaming industry.

In Barney's, Judge Taplitz, as affirmed by the Board, merely noted that gaming enterprises are analogous to

retail stores in that they directly serve the public. He then mechanically applied Board doctrine regarding no-solicitation rules in general retail establishments. He did not consider the evidence that gaming establishments closely controlled by State regulations, require more finely specialized rules regarding no solicitation which are specially fitted to the specialized interests and needs of the gaming industry. Similarly, in Sparks, Judge Gilbert, as affirmed by the Board, failed to balance Sparks' evidence that special circumstances exist in the state-regulated gaming industry which require broad no-solicitation rules. Rather, the Judge summarily concluded that the rule was not necessary for production, safety or discipline.

The Ninth Circuit enforced, with modification, the Board's orders regarding Petitioners' no-solicitation rules, but also failed to address Petitioners' evidence that special circumstances in the gaming industry support special no-solicitation rules. The Court of Appeals also simply applied general retail establishment no-solicitation doctrine stating:

> In *Barney's Club* and *Sparks Nugget*, the respondent employers are engaged primarily in the direct service of customers through their gambling, restaurant and bar facilities. There is no contention any of these facilities serve primarily as employee-service areas. Thus, under the previously discussed precedent, the respondents could promulgate no-solicitation rules which prohibited employees from engaging in solicitation or distribution of materials in areas open to the public even during non-working periods.
>
> We agree with the Board, though, that the rules promulgated by respondents were overly broad and thus invalid. (App. pp. 18-19)

Thus, the Board and the Court below completely failed to address the evidence submitted by Petitioners which

establishes the need for even more specialized no-solicitation rules for the gaming industry than those established for general retail operations. Neither the Board nor any court has indicated that the specialized rules for general retail operations or health care institutions provide the exhaustive list of specialized circumstances, or that new exceptions cannot be created in other types of industries. On the contrary, this Court unequivocally declared in *N.L.R.B. v. United Steelworkers of America*, 357 U.S. 357, 363, 78 S.Ct. 1208 (1958), that "mechanical answers" are of no avail "for the solution to this nonmechanical, complex problem in labor management relations."

The Third Circuit Court of Appeals aptly instructed in *N.L.R.B. v. Rockwell Manufacturing Co.*, 271 F.2d 109, 115 (3rd Cir. 1959):

> This is not to say that the Board could not apply a presumption of invalidity to the no-distribution rule. But the burden of proving the unfair labor practice is on the charging party. In order to determine whether the respondent had justified its rule the Board is compelled to examine all of the evidence. *If respondent is entitled to justify its rule, the Board must examine respondent's evidence.* (Emphasis added)

Accord, *McDonnell Douglas Corporation v. N.L.R.B.*, 472 F.2d 539 (8th Cir. 1973). By failing to properly address Petitioners' evidence of "special circumstances", the Board, as incorrectly supported by the Court of Appeals, in effect changed the Board's no-solicitation doctrine into an *irrebuttable* presumption and impermissibly encroached upon the overriding interests of Nevada to regulate its gaming industry.

Nevada is extensively regulated by over 150 separate statutory provisions of the Nevada Gaming Control Act

and by over 225 regulations and subregulations of the Nevada Gaming Commission and State Gaming Control Board. Review of these provisions indicates the gaming operators are carefully licensed and closely regulated in the public interest of the State of Nevada. (Nevada Gaming Control Act, Chapter 463.130) Any breach of a statutory provision or of a Gaming Board or Commission regulation can be grounds for loss of an operating license. (Gaming Commission and Gaming Control Board Regulation Section 5.010) The State also requires that gaming operation employees are to be closely regulated and are expected to maintain a high degree of integrity in light of their sensitive employment position. (Gaming Control Act, Chapter 463.335) Accordingly, all gaming employees must be licensed and fingerprinted. (Reg. 5.100) Cheating by an employee is not only grounds for loss of the employee's license, it can also be grounds for severe penalty against the gaming operator/employer. (Gaming Control Act, Chapter 463.337 :Reg. 5.011) State statutory provisions and administrative regulations further authorize the total exclusion of certain individuals from gaming operations whose association would not be in the interest of the industry or the State. (Gaming Control Act, Chapters 463.151-155) Gaming operators are under an affirmative obligation to keep their premises free of other individuals whose presence and association are inimical to the public interests. (Gaming Control Act, Chapter 463.151(3))

A broad no-solicitation rule in gaming establishments the general public is necessary to police activities in gaming operations as required by the State of Nevada. Regulation 5.011(1) states that a gaming operator may be disciplined for the "failure to exercise discretion and sound judgment to *prevent* incidents which might reflect on the repute of

the state of Nevada and act as a detriment to the development of the industry." (Emphasis added.) Petitioners issued the instant off-shift employee no-solicitation rules in accord with these strict State regulations.

Nevada's laws intensively regulating the gaming industry, which necessitate Petitioners' broad no-solicitation rule, are established in the interests of the health, safety, and morals of the citizens of the State of Nevada. Where the interests of a state are not in full accord with federal labor law doctrine, the interests of the State are not always to be ignored or preempted. Rather, this Court has indicated that states can regulate in areas where there is "an overriding state interest", *San Diego Trades Council v. Garmon,* 359 U.S. 243 (1959), and has also indicated that local health and safety regulations are entitled to some deference. *Teamsters, Local 24 v. Oliver,* 358 U.S. 283 (1959). Regulation of gaming operations is clearly an overriding State and local concern, and here the State regulations necessitating the Petitioners' broad no-solicitation rules are based on health, safety and public interest.

Additionally, Petitioners' rules, based on the State's regulations, only constrict the organizational rights of *off shift* employees who the Board and the courts have indicated should be treated as *non*employee solicitors. *GTE Lenkurt, Inc.,* 204 N.L.R.B. 921 (1973); *Diamond Shamrock Co., v. N.L.R.B.* 443 F.2d 52 (3rd Cir. 1971). This Court has recently upheld a state court application of state trespassing laws even though those laws had some limiting effect on the arguably protected organizational rights of *non*employees. *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180 (1978). Accordingly, deference to the State gaming statute here by the Board in determining whether "special circumstances" exist is clearly proper.

By refusing to consider "special circumstances" here, the

Board with Court approval, violated Petitioners' rights to due process by creating an irrebuttable presumption. Accordingly, absent overturning the lower court and the Board completely, these actions should be remanded to the Board to allow a proper examination of whether "special circumstances" exist which support Petitioners' no-solicitation rules.

The Decision Below Conflicts With Other Courts of Appeal as to Consideration of Alternative Means of Communication by the Union; Those Means Existed Which Would Lessen the Degree of Special Circumstances Needed to Support Petitioners' No-solicitation Rules.

The Board and Ninth Circuit also failed to consider whether alternative means of communication, other than after shift in-house solicitation, existed by which the Union could advance its message. Several circuit courts of appeal have found that alternative methods of communication must be considered in determining the degree of "special circumstances" needed to be shown by an employer in support of a non-solicitation rule limiting *employees'* rights to engage in in-house solicitation.

Alternative means of communication as a necessary consideration in determining the validity of an employee no-solicitation rule was first required in *N.L.R.B. v. Rockwell Manufacturing Company, supra,* see particularly 271 F.2nd at 113-118 (3rd Cir. 1959). The Third Circuit's well-reasoned analysis of was based upon three of this Court's decisions, including *Republic Aviation Corporation v. N.L.R.B., supra,* which was decided together with *N.L.R.B. v. Le Tourneau Company of Georgia.* The Court noted that in the *Le Tourneau* case the Board had specifically found that the isolated nature of the plant made direct contact with employees away from the plant "extremely difficult".

The second case, *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 108, 76 S.Ct. 679 (1956) held that alternative methods of communication must be considered in determining the validity of a rule prohibiting the distribution of union literature by nonemployee union organizers on company premises. The third case, *N.L.R.B. v. United Steelworkers of America*, 357 U.S. 357, 78 S.Ct. 1268 (1958) held that a showing of diminished ability to communicate with employees is a vital consideration in determining whether a valid no-solicitation rule is fairly applied, "just as [it] is a vital consideration in determining the [initial] validity of the no-solicitation rule." (357 U.S. at 363-364) On these cases, the Third Circuit concluded:

> Clearly if the employees have virtually no alternative opportunities to distribute literature and membership applications, then respondent must show strong justification for its prohibition. *Conversely when, as the respondent contends in this case, the employees have readily available means of distribution, the employer's duty to show exceptional justifiable circumstances is lessened.* (Emphasis added)
>
> Moreover, the Board's decision merely held that respondent had offered no "valid reason for the application of its no-distribution rule." Nowhere does the Board's decision indicate that it considered the substantial evidence offered by respondent in justification of its rule, nor did it find that it operated to prevent the union from effectively reaching respondent's employees with its prounion message. (271 F.2d at 115-116)

The *Rockwell* rationale was reaffirmed recently in *Diamond Shamrock Co. v. N.L.R.B., supra.*

Similarly, the Eighth Circuit in *McDonnell Douglas Corporation v. N.L.R.B., supra,* 472 F.2d at 544-547, examined

Republic Aviation, supra; Babock & Wilcox, supra; and *United Steelworkers, supra,* and concluded that the availability of alternative means of communication must be considered by the Board in cases involving employee solicitation.

The Eighth Circuit declared at 547:

> ... [O]n remand the Board would be well advised to give consideration, *inter alia,* to ... (2) whether there are other means of access or communication available to employees for distribution and solicitation such as entrances to the parking lots and to the avenues considered in *Diamond Shamrock* and *Rockwell Manufacturing Co., supra;* ...

Thus, alternative means of communication is a necessary ingredient in any evaluation of the validity of a rule broadly prohibiting employee solicitation. A few courts have conversely concluded that alternative means of communication need not be considered by the Board in cases involving employee solicitation.[5] These courts erroneously concluded that the Court in *Republic Aviation* limited to its holding in *Peyton Packing,* which on the surface does not include consideration of alternative communication. These courts further attempt to distinguish the Board's decisions in *Babcox & Wilcox* and *United Steelworkers,* on the grounds that the former case involves *non*employee solicitation and that the latter case involves the invalid application of an admittedly valid rule.[6]

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5. *Time-O-Matic, Inc. v. N.L.R.B.,* 264 F.2d 96 (7th Cir. 1959); *N.L.R.B. v. United Aircraft Corporation,* 324 F.2d 128 (2nd Cir. 1963); *Republic Aluminum Company v. N.L.R.B.,* 394 F.2d 405 (5th Cir. 1968); and *National Steel Corporation v. N.L.R.B.,* 415 F.2d 1231 (6th Cir. 1969).

6. One other circuit court which had the opportunity to address the issue, after noting the conflict between the circuits, refused to decide the issue. *Korn Industries, Inc. v. N.L.R.B.,* 389 F.2d 117 (4th Cir. 1967). The Ninth Circuit enforcing the Board's decision here did not and has never expressly addressed the issue.

These cases reveal the conflict among the circuits which hinges on different interpretations of this Court's rulings. Accordingly, only this Court can provide a definitive resolution of the controversy, which it has not yet done. Two recent decisions of this Court support that conclusion.

In *N.L.R.B. v. Magnavox Company of Tennessee*, 416 U.S. 952 (1974), this Court stressed that the Board must consider alternative means of communication in cases involving employee no-solicitation rules which are asserted to be valid by "special circumstances". *N.L.R.B. v. Beth Israel Hospital, supra,* 98 S.Ct. at 2476, modifies *Magnavox*:

> While outside the health care context, the availability of alternative means of communication is not, with respect to organizational activity, a necessary inquiry, see *Babcock & Wilcox, supra,* 351 U.S. at 112-113, 76 S.Ct. at 684, it may be that *the importance of the employer's interest here demands use of a more finely calibrated scale.* (Emphasis added.)

Thus, even if this Court were to conclude that alternative means of communication is not a general requirement in cases involving employee or non-employee solicitation prohibitions the "special circumstances" which exist in the gaming industry require use of the "more finely calibrated scale" mandated by this Court in *Beth Israel, supra.*

Again, the matters involve clear and compelling state interests which should not be preempted by inconsistent federal labor law. Finally, Petitioners applications of their rules were proper.[7]

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7. The Board and the Court below incorrectly concluded that Sparks', applying its no-solicitation rule, illegally interrogated employee Launius regarding her Union activities and illegally counseled employee Dyer regarding the same. Launius was soliciting and apparently acting for the Union during working time. An employer can normally prohibit solicitation on working time as "working time for work". *Republic Aviation Corp., supra.* Accordingly, Sparks was privileged to question Launius whether her

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinion of the Ninth Circuit. Alternatively the matters should be remanded for further consideration.

Respectfully submitted,

December 31, 1980.

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actions were in violation of its valid rule prohibiting solicitation on working time. The collective bargaining agreement permitted Union representatives to engage in official Union activities during working time but required prior notice. Sparks needed to know whether Launius' Union activities during working time were peculiarly privileged. Launius was not an "authorized representative" within the meaning of the bargaining agreement, thus was told that such future solicitations by her would not be allowed.

The questioning of Launius was for legitimate purposes, and the conversation was not coercive; thus it was lawful. "When the inquiries are not undertaken in a threatening manner but are only isolated instances free of any coercion without any systematic intimidation in the background, they are not unlawful." *Amalgamated Meat Cutters, etc., Local No. 364 v. N.L.R.B.*, 435 F.2d 668 (9th Cir. 1970); *Sahara Tahoe v. N.L.R.B.*, 533 F.2d 1125 (9th Cir. 1976).

Employee Dyer was soliciting for the Union, both on Sparks time and on its premises after his shift had ended. Sparks, therefore, properly issued Dyer a counselling notice with regard to that solicitation. Dyer testified that he understood Petitioner's no-solicitation rule to mean that he could not solicit during working time. Thus, Sparks had a reasonable basis to believe that Dyer was soliciting in violation of its valid no-solicitation rule.

Appendix

No. .....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

BARNEY'S CLUB, INC.
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent.

SPARKS NUGGET INC.
d/b/a John Ascuaga's Nugget
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent.

APPENDIX TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL, RESTAURANT & BARTENDERS INTERNATIONAL UNION, AFL-CIO, *Intervenor,* vs. SILVER SPUR CASINO, *Respondent.*	No. 77-2311
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, *Intervenor,* vs. NEVADA CLUB, INC., *Respondent.*	No. 77-2939

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, *Intervenor,* vs. SPARKS NUGGET, INC., d/b/a JOHN ASCUAGA'S NUGGET, *Respondent.*	No. 77-2954
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, *Intervenor,* vs. BARNEY'S CLUB, INC., *Respondent.*	No. 77-2658
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, *Intervenor,* vs. FINALLY, INC., d/b/a THE PALACE CLUB, *Respondent.*	No. 77-2938

OPINION

On Application for Enforcement of an Order of the National Labor Relations Board

Before: KENNEDY and ANDERSON, Circuit Judges, and SCHWARTZ,* District Judge.

ANDERSON, Circuit Judge:

These consolidated cases are before this court pursuant to petitions filed by the National Labor Relations Board (Board) for enforcement of its Orders.[1] 29 U.S.C. § 160(e). The unifying issue is whether the employer-respondents violated sections 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing to bargain with the Union. We shall consider this issue first, then deal with the other issues that pertain to the individual respondents.

I. REFUSAL TO BARGAIN

A. *Background*

The respondents were all members of the Reno Employers Council (Council), a voluntary association of employers engaged in casino, restaurant and related businesses. The Council existed in part for the purpose of representing member-employers, in multi-employer units, in collective bargaining with labor organizations. The individual re-

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*The Honorable Edward J. Schwartz, Chief United States District Judge for the Southern District of California, sitting by designation.

1. We were advised by counsel for the respondents at oral argument that the Palace Club (No. 77-2938) had completely closed down, with no successor taking over that operation. The Board has not withdrawn its petition for enforcement of its order against the Palace Club. Without deciding whether the petition against the Palace Club has, in fact, been rendered moot, we deem this opinion to be moot as to the Palace Club if there is no employer upon whom the order may be enforced.

spondents joined the Council on different dates, but they all recognized the Union as the bargaining representative of a unit of their employees consisting of culinary workers, waiters and bartenders (employees). After being parties to successive multi-employer collective bargaining contracts with the Union,[2] respondents withdraw from their multi-employer bargaining units. Subsequent to their withdrawal from the multi-employer units, the respondents informed the Union that they would not negotiate new, individual collective bargaining agreements with the Union. Each respondent claimed to have a good faith doubt that the Union enjoyed the majority support of their respective employees.

Unfair labor practice charges were filed by the General Counsel of the Board against the respondents for their refusal to bargain with the Union. In each case the Board found that the respondents had committed unfair labor practices by withdrawing recognition of the Union as the collective bargaining representative of their employees and by refusing thereafter to bargain with the Union.[3] The

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2. Sparks Nugget, Silver Spur, Nevada Club, and the Palace Club were in the same multi-employer bargaining unit and were signatories to the same 1972-1975 collective bargaining agreement with the Union as the Sierra Development Co., *NLRB v. Sierra Development Co.*, 604 F.2d 606 (9th Cir. 1979), and Carda Hotels. *NLRB v. Carda Hotels*, 604 F.2d 605 (9th Cir. 1979).

Barney's Club, on the other hand, was a signatory to the same 1971-1974 collective bargaining agreement with the Union as Tahoe Nugget, *NLRB v. Tahoe Nugget*, 584 F.2d 293 (9th Cir.), *cert. denied*, 442 U.S. 921, 61 L.Ed.2d 290, 99 S.Ct. 2847, *reh. denied*, ... U.S. ....., 62 L.Ed.2d 12, 100 S.Ct. 186 (1979), Nevada Lodge, *NLRB v. Nevada Lodge*, *id.*, and Sahara-Tahoe, *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d 767 (9th Cir.), *cert. denied*, 442 U.S. 917, 61 L.Ed.2d 284, 99 S.Ct. 2837, *reh. denied*, ...U.S....., 62 L.Ed.2d 122, 100 St.Ct. 187.

3. *Silver Spur Casino*, 228 NLRB 1147 (1977); *Nevada Club, Inc.*, 229 NLRB 1186 (1977); *Sparks Nugget, Inc.*, 230 NLRB 275 (1977); *Barney's Club, Inc.*, 227 NLRB 414 (1977); *Finally, Inc. d/b/a Palace Club*, 229 NLRB 1128 (1977).

Board ordered each respondent to cease and desist from the unfair labor practices and required each respondent to recognize and, upon request, bargain with the Union, and post certain notices. These cases are before us in part, for the enforcement of those orders.

We enforce the Board's orders on the issue of the respondents' refusal to bargain based upon the principles we have announced in *Tahoe Nugget, Sahara-Tahoe, Carda Hotel,* and *Sierra Development.*[4]

We deal with the issue in more depth in the following discussion to emphasize and, where necessary, to clarify portions of our previous opinions.

B. *Discussion*

In an unfair labor practice proceeding before the Board the burden is upon the General Counsel to establish by a preponderance of evidence that an unfair labor practice has occurred. *NLRB v. United Brotherhood of Carpenters & Joiners, etc.,* 531 F.2d 424, 426 (9th Cir. 1976). Where an employer has been charged with a violation of section 8(a)(5), refusal to bargain, the General Counsel must show that the union represented a majority of the employees in the unit at the time the employer refused to bargain with the union. *NLRB v. Tahoe Nugget, Inc.,* 584 F.2d at 297.

1. *Presumption of Majority Support*

The General Counsel is assisted by a presumption of majority union support in its attempt to meet its burden of proving that the employer unlawfully refused to bargain. "For a reasonable time, usually one year, after certification or voluntary recognition, majority support is irrebuttably presumed absent 'unusual circumstances.' After one

4. Citations at footnote 2.

year, the presumption becomes rebuttable." *Id.* Where sufficient proof to rebut the presumption is not presented by the employer, the presumption carries the General Counsel's burden of proof regarding the unfair labor practice charge. *Id.*

An employer may rebut the presumption by presenting sufficient evidence to demonstrate that the union was actually in the minority or that the employer had a good faith reasonable doubt of the union's majority support at the time of the refusal to bargain. *Id.* If the presumption is deemed rebutted, then the General Counsel must come forward with evidence to satisfy its burden of proof. *National Cash Register Co. v. NLRB,* 494 F.2d 189 (8th Cir. 1974).

The rebuttable presumption was applied by the Board in these cases. The Board determined that the respondents had not rebutted the presumption and found that they had committed unfair labor practices by refusing to bargain with the Union.

The respondents challenge that determination on the grounds that:

a. the presumption should not be applicable in a situation where employers have withdrawn from a multi-employer unit;

b. an employer's good faith belief is all that is required to rebut the presumption of majority support for the union;

c. the objective factors considered by the respondents were sufficient to rebut the presumption of majority support for the union.

d. the respondents were improperly precluded from showing that only a minority of employees supported the union.

e. the Board has made it impossible to rebut the presumption under the circumstances.

2. *Withdrawal from the Multi-Employer Unit*

The respondents contend that their withdrawal from the multi-employer bargaining unit should allow them to start anew in their relationship with the Union. That is, they wish to be viewed as single employers faced with the Union's initial claim for recognition.

In four previous cases[5] we have rejected that approach and have determined that the presumption survives an employer's withdrawal from the multi-employer bargaining unit.[6]

The bargaining history of the respondents shows that the same fact patterns have occurred. Thus, the conclusions reached in our previous cases apply equally as well here.

Moreover, our conclusion that the presumption survives the respondents' withdrawal from the multi-employer unit is a recognition that the presumption is also grounded in policy, not just probability. *NLRB v. Tahoe Nugget,* 584 F.2d at 302. 302. The most valued objective of the Act is industrial peace. Application of the presumption is a policy determination by the Board that industrial peace is more likely to be achieved by maintaining continuity in the bargaining structure.

We have not failed to observe that, in so deciding, the Board has favored continuity in the bargaining structure

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5. *NLRB v. Tahoe Nugget; Sahara-Tahoe Corp. v. NLRB; NLRB v. Sierra Development Co.; NLRB v. Carda Hotels.*

6. In the formation of multi-employer units, it is an unfair labor practice for an individual employer to voluntarily recognize a union which does not enjoy majority support among that employer's employees. Thus when employers join a multi-employer unit and recognize the union, they are viewed as implicitly declaring that the majority of their employees favor the union. Subsequent withdrawal from the multi-employer unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor the union's representation. *NLRB v. Tahoe Nugget* at 303.

over the enhancement of employee free choice. However, the Board's decision, while not enhancing employee rights, does not adversely affect those rights. As always, the employees may exercise their freedom of choice by petitioning the Board for an election to choose whether to have another representative or to have no union representation at all. Adherence to the presumption does not stifle that right.

The presumption does make it more difficult for the respondents to rely on employee rights in refusing to bargain with their employees' designated representative. However, as we stated in *Tahoe Nugget, at* 301, "[I]n refusing to bargain because of an alleged decline in union adherents, the employer is acting as vicarious champion of its employees, a role no one has asked it to assume." See, *Brooks v. NLRB,* 348 U.S. 96, 103, 99 L.Ed. 125, 75 S.Ct. 176 (1954).

We thus believe that the Board has not abused its discretion in applying the presumption of majority union support here where employers have withdrawn from a multi-employer unit.

3. *Good Faith Reasonable Doubt*

An employer may withdraw recognition from an incumbent union because of its asserted good faith doubt of the union's support. Respondents contend that under *Celanese Corporation of America,* 95 NLRB 664 (1951), the employer's good faith belief that the union no longer had the majority support of its employees is all that is required. The respondents misread *Celanese* and misconceive the law.[7]

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7. Respondents correctly quoted a passage from *Celanese* which states that:

> "We believe that the answer to the question whether the Respondent violated Section 8(a)(5) of the Act on October 8 depends not on whether there was sufficient evidence to demonstrate that the Union in fact did not represent the majority

An employer's good faith doubt of a union's majority status must be reasonable and supported by objective considerations. *NLRB v. Cornell of Cal., Inc.*, 577 F.2d 513, 515-516 (9th Cir. 1978); *Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977); *NLRB v. Tahoe Nugget*, 584 F.2d at 299. Respondents' contrary interpretation of the law is erroneous.

4. *Establishing Good Faith Reasonable Doubt*

Whether an employer has established a good faith reasonable doubt defense is a determination that must be made initially by the Board. The Board's decision will be upheld if it is supported by substantial evidence on the record as a whole. *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d at 771.

In *Tahoe Nugget* and *Sahara-Tahoe* we stressed that the evidence presented to establish reasonable good faith doubt, individually or cumulatively, must unequivocally indicate

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of the employees but upon whether *the Employer in good faith believed* that the Union no longer represented the majority of the employees."

Id. at 671. However, the respondents failed to turn the page and read on as the Board, later in the opinion, went on to elaborate on the "good faith" criteria, and stated that:

> "By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in light of the totality of all the circumstances involved in a particular case. But among such circumstances, two factors would seem to be essential prerequisites to any finding that the employer raised the majority issue in good faith in cases in which a union had been certified. *There must, first of all, have been some reasonable grounds for believing that the union had lost its majority status* since its certification. And, secondly, the majority issue must not have been raised by the employer in a context of illegal anti-union activities, or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union." (emphasis added)

Id. at 673.

that union support had declined to a minority. In those cases the Board found that the employers had not established the good faith doubt defense. Some evidence was presented of employee discontent, high employee turnover rates, low union membership, financial difficulties of the union, and a vigorous union membership drive. However, after evaluating the evidence, the Board determined that the evidence introduced by the respondents was not sufficient to support a good faith reasonable doubt of the union's majority status. The evidence, standing alone or viewed in their totality, presented only an ambiguous inference of loss of majority support for the union. We enforced the Board's orders in those cases, determining that there was substantial evidence on the record as a whole to support the findings.

The evidence presented here does not differ materially from that considered by the Board and this court in *Tahoe Nugget* and *Sahara-Tahoe*. The Board in the present cases found that the respondents failed to establish the good faith reasonable doubt defense. Substantial evidence on the record as a whole supports the findings that the evidence, individually or cumulatively, presents only an equivocal inference of loss of majority support for the union.

5. *Actual Loss of Majority*

The presumption may also be rebutted when the employer brings forth sufficient evidence to demonstrate that the union did not, in fact, have the support of a majority of the employees in the unit. *Tahoe Nugget*, 584 F.2d at 297.

In *Barney's Club* the administrative law judge determined that the respondent's evidence fell short of demonstrating that the union did not have majority support. The Board

affirmed. Reviewing the record as a whole, we uphold that decision.

In *Silver Spur, Sparks Nugget, Nevada Club* and *Finally, Inc.*, the respondents were restricted in their ability to question Board field examiner David Sargent and Union agent Howard Lawrence. They contend that the Board's actions erroneously prevented them from presenting their "actual loss of majority" defense and thus their cases should be remanded.

a. *Board Field Examiner Sargent*

Respondents, in their individual cases, subpoenaed Board field examiner Sargent. The administrative law judges quashed the subpoenas on the basis that Sargent's testimony would have been irrelevant *(Nevada Club; Finally, Inc.)*, or that 29 CFR § 102.118 prevented the subpoena from issuing to an agent of the Board without the Board's or General Counsel's consent *(Silver Spur, Sparks Nugget)*.

In *NLRB v. Heath Tec Division/San Francisco*, 566 F.2d 1367, 1371 (9th Cir.) *cert. denied*, 439 U.S. 832, 58 L.Ed.2d 127, 99 S.Ct. 110 (1978), we stated that in the absence of some valid evidentiary objection or privilege, 29 CFR § 102.118 cannot alone be the basis for the revocation of a properly issued subpoena. Thus the rulings of the administrative law judges in *Silver Spur* and *Sparks Nugget* were erroneous. However, the Board upheld the quashing of the subpoenas in all the cases, finding that a valid evidentiary privilege and a valid evidentiary objection existed. We agree.

The Board determined that there was an evidentiary privilege which protected the informal investigatory and trial preparatory process of administrative agencies, citing

Stephens Products Co., Inc. v. NLRB, 515 F.2d 1373, 1376-1378 (8th Cir. 1975). Sargent apparently had spoken informally to the attorneys representing the respondents and had stated that the refusal to bargain charges would probably be dismissed. Later, however, formal complaints were filed, charging the respondents with refusing to bargain. Through Sargent respondents sought to establish that the initial determintaions were actually made and they also sought the information which provided the basis for those determinations.

It is clear that the testimony and documents which the respondents sought were informal investigatory material and preliminary determinations. The qualified privilege of preserving the confidentiality of investigative files is applicable here. *NLRB v. Heath Tec,* 566 F.2d at 1370; *Stephens Products Co., Inc. v. NLRB,* 515 F.2d at 1376.

As in *Heath Tec,* and *Stephens Products Co., supra,* we conclude that the investigatory privilege concerning "informal deliberations of all prosecutorial agencies and branches of government" (*Stephens Products,* p. 1376, n.1) was properly invoked. Others were present during conversations with Sargent. They were not called as witnesses, however, and respondents have shown no reason why examining these people was not possible or would not have produced information similar to that which they sought from Sargent. Moreover, we have some doubt whether the information sought was sufficiently material to respondents' case to outweigh the privilege.

b. *Union Agent Lawrence*

The Board also sustained objections to the questioning of Union agent Lawrence regarding whether the Union had any records that would disclose it represented an actual

majority of the unit employees of the respective respondents. The Board determined that the line of questioning was irrelevant because where union membership was voluntary, as in Nevada, such records provided no correlation to whether a majority of employees desired representation.

We affirm the Board's decision, but on a different basis. The Board cited *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 491 (2d Cir. 1975), for the proposition that union membership is irrelevant to the determination of a union's majority status. We do not agree. It is true that in a right-to-work state an employee may choose not to join a union, but, nevertheless, desire union representation. However, this observation does not render union membership irrelevant to a determination of whether an employee had a reasonable doubt of the union's majority or whether the union in fact lacked majority support. Union membership, even in a right-to-work state, is some indication of union support, though it may be only marginally relevant. *NLRB v. Tahoe Nugget*, 584 F.2d at 307, *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir.), *cert. denied*, 434 U.S. 818, 54 L.Ed.2d 74, 98 S.Ct. 57 (1978), and *Terrell Machine Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir.), *cert. denied*, 398 U.S. 929, 26 L.Ed.2d 91, 90 S.Ct. 1821 (1970), are not to the contrary.

The question asked by the respondents was whether the Union could produce any records that would demonstrate that it had the majority support of the employees. Although not dispositive, the question had some relevance to the issues of the Union's majority status and should have been allowed.

However, based upon the record before us, we cannot say that reversible error was committed. If the Union had answered the question affirmatively, the Union's position

would have been bolstered. If the question had been answered in the negative, that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption would not have been rebutted.[8] Therefore, we find no error that would require a reversal.

6. *Impossibility of Rebutting the Presumption*

Finally, the respondents contend that the Board has in effect created a presumption that is impossible to rebut. Respondents argue that the burden is placed upon them to rebut the presumption, but they are denied the means to do so. Further, the respondents contend that the Board has demanded more evidence than should be required to rebut the presumption.

We find no merit to the respondents' first argument. As we discussed in the previous section, the Board's rulings regarding Board field examiner Sargent and union agent Lawrence did not improperly deny the respondents access to information.

As to the respondents' second argument, we recognize the force of their contention that the Board has accorded too much weight to the presumption in these cases. This issue involves an important and difficult question which is of current national interest in the labor relations field. Respondents cite cases in other circuits which may have found

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8. See, *Barney's Club Incorp.*, 227 NLRB 414 (1976) (Board affirming administrative law judge's determination that the respondent failed to establish that the Union in fact did not represent a majority of the respondent's employees).

Moreover, respondents did not materially rephrase the question after the administrative law judge's ruling and either ended the line of questioning or dropped the subject matter.

the presumption rebutted upon similar or even weaker evidence than was presented in these cases.[9] Accepting, arguendo, that a conflict exists on this issue, we nevertheless adhere to the views expressed in this and our previous opinions. While we find that there is substantial evidence on the record as a whole to support the Board's decision in each of these cases, we also believe that the policies and goals of the Act will be best served by the enforcement of the Board's orders on the respondents' refusal to bargain.

II. *NO SOLICITATION RULE*

A. *Background*

In *Barney's Club* and *Sparks Nugget* the employers promulgated no-solicitation rules which, among other things, prohibited employees from soliciting on company premises after their shifts had been completed. The Board determined in both cases that the employers had violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by maintaining the rules. We agree with the Board that the rules

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9. Respondents have cited cases from various circuits where the presumption of majority support was deemed rebutted. See, *e.g.*, *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542 (7th Cir. 1970); *Star Manufacturing Co. v. NLRB*, 536 F.2d 1192 (7th Cir. 1976); *Lodges 1746 & 743, Int'l Ass'n of Mach. & Aero. Workers v. NLRB*, 416 F.2d 809 (D.C. Cir.), *cert. denied*, 396 U.S. 1058, 24 L.Ed.2d 752, 90 S.Ct. 751 (1970); but see, *Teamsters Local U. 769 v. NLRB*, 532 F.2d 1385 (D.C. Cir. 1976); *National Cash Register Co. v. NLRB*, 494 F.2d 189 (8th Cir. 1974); *National Car Rental System v. NLRB*, 594 F.2d 1203 (8th Cir. 1979); *NLRB v. Alvin J. Bart & Co., Inc.*, 598 F.2d 1267 (2d Cir. 1979); *W & W Steel Co. v. NLRB*, 599 F.2d 934 (10th Cir. 1979); *Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974); *NLRB v. Nu Southern Dyeing & Finishing, Inc.*, 444 F.2d 11 (4th Cir. 1971); *NLRB v. Randall-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978). Of these cases cited by respondents, we believe only *W & W Steel Co. v. NLRB*, *Star Manufacturing Co. v. NLRB* and *Ingress-Plastene, Inc. v. NLRB*, present factual situations in which other circuits may have found the presumption of majority support rebutted upon similar or weaker evidence than presented in these cases.

promulgated by these respondents were violative of Section 8(a)(1). However, we believe the Board's orders were too broad. We thus enforce the Board's order as modified herein.

B. *Discussion*

1. *Applicable Law*

The freedom to communicate is essential to the effective exercise of organizational rights granted to employees under Section 7 of the Act, 29 U.S.C. § 157. *Central Hardware Co. v. NLRB,* 407 U.S. 539, 543, 33 L.Ed.2d 122, 92 S.Ct. 2238 (1972); *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 491, 57 L.Ed.2d 370, 98 S.Ct. 2463 (1978). However, the right of employees to solicit or distribute materials must be balanced against an employer's right to maintain discipline in its establishment. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 797-798, 89 L.Ed. 1372, 65 S.Ct. 982 (1945). Thus, certain rules have been developed with respect to the exercise of employee organizational rights under Section 7. Since "working time is for work," a rule prohibiting employee solicitation and distribution of literature during work time is presumed to be valid. On the other hand, "the time outside work, whether before or after work, or during luncheon or rest periods, is an employees' time to use as he wishes without unreasonable restraint," even though he is on company property. Therefore, a rule prohibiting employee solicitation or distribution of literature during nonworking time in nonwork areas is presumptively invalid unless special circumstances warrant the adoption of the rule. *Republic Aviation,* at 802 n. 10; *NLRB v. Magnavox Co.,* 415 U.S. 322, 325, 39 L.Ed.2d 358, 94 S.Ct. 1099, *reh. denied,* 416 U.S. 952, 40 L.Ed.2d 302, 94 S.Ct. 1962 (1974).

The finding of the requisite "special circumstances" or an exception to the presumption of invalidity may arise where the business is one dealing in direct selling and service to customers. The Board has approved employer rules which prohibit all employee solicitations, even during an employee's nonworking time, in the selling areas of stores and restaurants on the theory that such activity may tend to drive away customers. *May Department Stores Co., d/b/a Famous-Barr Co.*, 59 N.L.R.B. 976, 981, *enf'd as modified*, 154 F.2d 533 (8th Cir.), *cert. denied*, 329 U.S. 725, 91 L.Ed. 627, 67 S.Ct. 72 (1946); *Goldblatt Bros., Inc.*, 77 N.L.R.B. 1262, 1264 (1948); *Marriott Corp., Children's Inn*), 223 N.L.R.B. 978 (1978); *see also Beth Israel Hospital* at 493. In allowing the broader no-solicitation rules, the goal has been to strike the appropriate balance between organizational rights of employees and the rights of employers to control their businesses. Thus, as the Supreme Court stated in *Beth Israel Hospital* at 506:

> "In the retail marketing and restaurant industries, the primary purpose of the operation is to serve customers, and this is done on the selling floor of a store or in the dining area of a restaurant. Employee solicitation in these areas, if disruptive, necessarily would directly and substantially interfere with the employer's business. On the other hand, it would be an unusual store or restaurant which did not have stockrooms, kitchens, and other nonpublic areas, and in those areas employees solicitation of nonworking employees must be permitted. In that context, the Board concluded that, on balance, employees' organizational interests do not outweigh the employer's interests in prohibiting solicitation on the selling floor."

However, the fact that an establishment is a restaurant or a store does not automatically allow it to impose a broad no-solicitation rule. In *Beth Israel Hospital* the

question was whether a hospital cafeteria could prohibit employee solicitations in its dining room. The Supreme Court noted that the primary purpose of the hospital was patient care and therapy. The hospital cafeteria functioned more as an employee-service area than a patient care area, as 77% of its patrons were employees. Thus the Court stated that "when the primary function and use of the cafeteria, the availability of alternative areas of the [hospital] facility in which § 7 rights effectively could be exercised, and the remoteness of interference with patient care are considered," it was appropriate for the Board to strike the balance in favor of § 7 rights in the hospital cafeteria. *Id.* at 506. Therefore, the relationship of the restaurant or store to the employer's business enterprise must also be considered in striking the appropriate balance between employee and employer rights.

Even though an employer's business enterprise justifies a more restrictive no-solicitation rule, that rule may be over-broad and thus invalid. *Marriott Corp.* at 978. In *Marriott Corp.* the Board stated that the employer could prohibit solicitation, even during employee break and lunch periods, in areas where customers were likely to be present. However, the Board determined that the employer's rule was not limited to the customer or sales area of the restaurant; thus the rule was declared to be over-broad and invalid on its face.

2. *Present Cases*

In *Barney's Club* and *Sparks Nugget* the respondent employers are engaged primarily in the direct service of customers through their gambling, restaurant and bar facilities. There is no contention that any of these facilities serve primarily as employee-service areas. Thus, under the previously-discussed precedents, the respondents could

promulgate no-solicitation rules which prohibited employees from engaging in solicitation or distribution of materials in areas open to the public even during nonworking periods.

We agree with the Board, though, that the rules promulgated by the respondents were overly broad and thus invalid. However, the Board's orders in these cases were themselves overly broad. The orders stated that the respondments must cease and desist from:

> "maintaining any rule or regulation prohibiting its employees from soliciting on its premises after their shifts have been completed unless such prohibition is demonstrably necessary to maintain production, discipline or security."

The orders go too far. Since the respondents could prohibit their employees from soliciting during nonworking hours in public areas of their premises, we modify the Board's order to read that the respondents must cease and desist from:

> "maintaining any rule or regulation prohibiting its employees from soliciting on its premises during nonworking hours in nonpublic areas of its premises."

We enforce the Board's order on this issue as modified.

III. *UNILATERAL CHANGES*

As long as its bargaining obligation is not extinguished, an employer has a continuing duty to bargain over mandatory subjects of bargaining without instituting unilateral changes, even after the expiration of the prior agreement. *NLRB v. Sky Wolf Sales*, 470 F.2d 827 (9th Cir. 1972). See, *Allied Chemical & Alkali Workers v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 30 L.Ed.2d 341, 92 S.Ct. 383 (1971). Mandatory subjects of collective bargaining include insurance benefits and grievance procedures for employees.

404 U.S. at 159; The Developing Labor Law, 404 (1971).

In *Sparks Nugget,* the Board found that the employer committed unfair labor practices in violation of Sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 158(a)(5) and (1), by unilaterally implementing a new grievance procedure and a new insurance program.

The respondent's sole argument to justify the unilateral change in the grievance procedure was that the change was made after its obligation to bargain had terminated. We have already ruled in Section I that there was a continuing duty to bargain. The respondent's unilateral change of the grievance procedures was an unfair labor practice. *NLRB v. United Nuclear Corp.,* 381 F.2d 972 (10th Cir. 1967). We enforce the Board's order on this issue.

There appears to be little question that the new insurance plan was implemented by the respondent without consultation or negotiation with the Union over the matter. The respondent was found to have committed an unfair labor practice. The administrative law judge, however, limited the proposed remedy to requiring the respondent to "cease and desist from unilaterally altering or modifying the terms and conditions of a collective bargaining agreement it may have with the Union" (R. 151) because he found that the Union had condoned the respondent's actions.[10] The decision and order were affirmed by the Board.

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10. The administrative law judge stated:

"It further appears from the failure of the Union to lodge any protest with regard to the unilateral implementation of the program, the position taken by the Union as to compliance with Section 3 of article XVIII, and the attempt, disclosed in McKinlay's testimony, to obtain benefits for an employee under the program, that the Union condoned the Respondent's failure to consult with it prior to its implementation . . . ." (R. 151)

The Board affirmed the administrative law judge's findings.

We cannot agree that an unfair labor practice can be found as the acts were condoned.

Condonation takes place when the injured party demonstrates a willingness to forgive the improper conduct and "wipe the slate clean." *Confectionery & Tobacco Drivers & Warehousemen's Union v. NLRB,* 312 F.2d 108, 113 (2d Cir. 1963); *Cast Optics Corp. v. NLRB,* 458 F.2d 398, 404 (3d Cir.) *cert. denied,* 409 U.S. 850, 34 L.Ed.2d 92, 93 S.Ct. 58 (1972). In *Confectionery & Tobacco Drivers,* employees had engaged in a walkout in violation of their contractual no-strike clause. The court there stated, however, that, "[A]fter a condonation the employer may not rely upon prior unprotected activities of employees to deny reinstatement to, or otherwise to discriminate against them." 312 F.2d at 113.

We agree with the Board that condonation took place with regard to the implementation of the new insurance plan. The Union's condonation of the unilateral action, however, "wipes the slate clean." The Board erred in its application of the law of condonation; there was no unfair labor practice upon which to base the charge. We, therefore, deny enforcement of the cease and desist order.

IV. *REFUSING TO PROVIDE A COPY OF THE NEW INSURANCE PLAN*

There is a duty on the part of the employer to supply the Union, upon request, with sufficient information to enable the Union to effectively carry out its collective bargaining duties. *San Diego Newspaper Guild, etc. v. NLRB,* 548 F.2d 863, 866 (9th Cir. 1977). The information however, must be relevant to a legitimate union collective bargaining need. *Id.* 548 F.2d at 867. Failure of the employer to comply with a request for relevant information is a

violation of Sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 1158(a)(5) and (1).

The administrative law judge found, and the Board summarily affirmed, that the respondent committed an unfair labor practice in violation of Sections 8(a)(5) and (1) by its refusal to furnish the Union with a requested copy of the new insurance program. Since there was a continuing duty to bargain, the refusal to comply with the request was found to inhibit the Union in meaningfully bargaining with the respondent. We enforce the Board's order on this issue; substantial evidence on the record as a whole supports the Board's determination.

V. *INTERROGATION OF EMPLOYEE LAUNIUS*

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), provides that it shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act. The questioning of employees by the employer regarding their concerted activities can be a violation of Section 8(a)(1) where it interferes with Section 7 rights. *Amalgamated Meat Cutters, etc., Local No. 364 v. NLRB,* 435 F.2d 668 (9th Cir. 1970). However, employer questioning of employees regarding their concerted activities is not per se unlawful. *Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074, 1080 (9th Cir. 1977). "The test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with employees in the exercise of their protected rights." *Id.* at 1080. To be an unfair labor practice, interrogation "must be associated with express or implied threats or promises, or form part of an overall pattern tending to restrain or coerce employees with regard to their protected activities. *Amalgamated Meat Cutters,* 435 F.2d at 669.

The Board affirmed the administrative law judge's finding that the employer in *Sparks Nugget* unlawfully interrogated employee Gail Launius in violation of Section 8(a)(1). The administrative law judge's determination was based upon its finding that the totality of the circumstances indicated animosity towards the employee for her union activity and that a threat of discharge for any "further" violation of the company's no solicitation rule was made.

This issue presents a close question. However, the inferences drawn from the facts by the administrative law judge and affirmed by the Board are reasonable. Finding substantial evidence on the record as a whole, we enforce the Board's order on this issue.

VI. *REPRIMAND OF EMPLOYEE DYER*

An employer violates Sections 8(a)(3) and (1) of the Act, 29 U.S.C. §§ 158(a)(3) and (1) by discriminating to encourage or discourage membership in any labor organization. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 98 L.Ed. 455, 74 S.Ct. 323 (1954). Discrimination violative of Sections 8(a)(3) and (1) may be found where an employer disciplines an employee because that employee has engaged in or is suspected of engaging in union activities. *NLRB v. Bin-Dictator Co.*, 356 F.2d 210, 214-215 (6th Cir. 1966).

The Board found that employee John Dyer was reprimanded by the employer in *Sparks Nugget* because he was suspected of engaging in union activities and the employer sought to deter him from such activities. (R. 146) While different inferences may be drawn from the facts, the inferences drawn by the Board were reasonable and supported by substantial evidence on the record as a whole. We enforce the Board's order on this issue.

CONCLUSION

Summarizing our disposition of the various issues considered:

1. We enforce the Board's orders with regard to the respondents' refusal to bargain (Section I);

2. The Board's orders concerning the respondents' no solicitation rules in *Barney's Club* and *Sparks Nugget* are enforced as modified (Section II);

3. The Board's order regarding the unilateral changes made in *Sparks Nugget* is enforced as to the unilateral implementation of the new grievance procedure, but denied as to the unilateral implementation of the insurance program (Section III);

4. The respondent in *Sparks Nugget* committed an unfair labor practice in refusing to provide the Union with a copy of the new insurance program; therefore, we enforce the Board's order on that issue (Section IV);

5. The interrogation of Sparks Nugget employee Launius and the reprimand of employee Dyer were unfair labor practices. Thus, we enforce the Board's order on those issues (Sections V & VI).

IT IS SO ORDERED.

FILED Jul 14 1980
Richard H. Deane
Clerk, U.S. Court of Appeals

In The United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL, RESTAURANT & BARTENDERS INTERNATIONAL UNION, AFL-CIO, *Intervenor,* vs. SILVER SPUR CASINO, *Respondent.*	No. 77-2311
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, *Intervenor,* vs. NEVADA CLUB, INC., *Respondent.*	No. 77-2939
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, *Intervenor,* vs. SPARKS NUGGET, INC., d/b/a JOHN ASCUAGA'S NUGGET, *Respondent.*	No. 77-2954

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, *Intervenor,* vs. BARNEY'S CLUB, INC. *Respondent.*	No. 77-2658
NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, *Intervenor,* vs. FINALLY, INC., d/b/a THE PALACE CLUB, *Respondent.*	No. 77-2938

ORDER

Before: KENNEDY and ANDERSON, Circuit Judges, and SCHWARTZ,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested

*The Honorable Edward J. Schwartz, Chief United States District Judge for the Southern District of California, sitting by designation.

a vote on the suggestion for rehearing en banc. Fed. R. App. P. 3b(b).

The opinion in these consolidated appeals is amended as follows:

> At page 16, line 28 (of the typed manuscript), by *adding* to the modification of the Board's Order the following language after the word "premises":
>
> > "unless such prohibition is demonstrably necessary to maintain production, discipline or security."
>
> and as applied to *Barney's Club,* No. 77-2658, and Sparks Nugget, No. 77-2654.

The National Labor Relations Board shall forthwith submit proposed judgments reflecting this amendment.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

RECEIVED
SEP 19 1980
Severson, Werson,
Berke & Melchior

RECEIVED
Richard H. Deane
Clerk, U.S. Court of Appeals
AUG 4 1980
Filed 9-12-80
Docketed 8-27-80

United States Court of Appeals
For the Ninth Circuit

No. 77-2954

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES
& BARTENDERS UNION, LOCAL 86,
Intervenor,

v.

SPARKS NUGGET, INC., d/b/a
JOHN ASCUAGA'S NUGGET,
Respondent.

AMENDED JUDGMENT

Before: KENNEDY and ANDERSON, Circuit Judges, and SCHWARTZ,* District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforce-

1. The Honorable Edward J. Schwartz, Chief United States District Judge for the Southern District of California, sitting by designation.

ment of an order issued by it against the Respondent, Sparks Nugget, Inc., d/b/a John Ascuaga's Nugget, Sparks, Nevada, its officers, agents, successors, and assigns on June 17, 1977. The Court heard argument of respective counsel on December 12, 1979, and has considered the briefs and transcript of record filed in this cause. On May 27, 1980, the Court, being fully advised of the premises, handed down its opinion granting enforcement of the Board's Order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Sparks Nugget, Inc., d/b/a John Ascuaga's Nugget, Sparks, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining any rule or regulation prohibiting its employees from soliciting on its premises during nonworking hours in nonpublic areas of its premises unless such prohibition is demonstrably necessary to maintain production, discipline or security.

(b) Unlawfully interrogating employees concerning their relationship to and activities upon behalf of Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, (hereinafter called the Union) or any other labor organization.

(c) Issuing warning notices to employees in order to deter them from supporting or engaging in activities upon behalf of said Union, or any other labor organization.

(d) Unilaterally instigating, establishing, maintaining, or utilizing the Sparks Nugget Employees' Council and the grievance procedure of which said Council is a part.

(e) Unilaterally instituting any alterations, modifications or changes in the terms and conditions of employment which are mandatory subjects of bargaining with the aforesaid Union.

(f) Refusing to furnish to said Union a copy of its current insurance program covering employees represented by said Union.

(g) Refusing to recognize and bargain with said Union as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

All employees employed by the Respondent in its bar and culinary operations at its Sparks, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with the Union, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions and other terms and conditions of employment of the unit employees, and if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

All employees employed by the Respondent in its bar and culinary operations at its Sparks, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

(b) Furnish said Union, upon request, a copy of its current insurance policy covering its employees in the above-described bargaining unit.

(c) Remove from the personnel file of John Dyer the warning notice it issued to him on or about January 20, 1975.

(d) Post at its Sparks, Nevada, place of business copies of the attached notice marked "Appendix." Copies of the notice on forms provided by the Regional Director for Region 20 of the National Labor Relations Board (San Francisco, California) after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(e) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply herewith. Costs in this court in favor of the petitioner and against the respondent.

Costs:
BRIEF FOR THE
PETITIONER $235.54

Endorsed, Judgment Filed and Entered

/s/ RICHARD H. DEANE
Clerk

A TRUE COPY

ATTEST:

RICHARD H. DEANE
Clerk

SO ORDERED:

JUDGES:

ANTHONY M. KENNEDY, CJ

J. BLAINE ANDERSON, CJ

Edward J. Schwartz, DJ

A TRUE COPY
ATTEST 18 SEP 1980

Richard H. Deane
Clerk of Court

by: Oscar Tagle
Deputy Clerk

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT maintain any rule or regulation prohibiting our employees from soliciting on our premises during nonworking hours in nonpublic areas of its premises unless such prohibition is demonstrably necessary to maintain production, discipline or security.

WE WILL NOT unlawfully interrogate employees concerning their relationship to and activities upon behalf of Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, or any other labor organization.

WE WILL NOT issue warning notices to employees in order to deter them from supporting or engaging in activities upon behalf on said Union, or any other labor organization.

WE WILL NOT instigate, establish, maintain, or utilize Sparks Nugget Employees' Council and the grievance procedure of which said Council is a part.

WE WILL NOT unilaterally institute any alterations, modifications, or changes in the terms and conditions of employment which are mandatory subjects of bargaining with the aforesaid Union.

WE WILL NOT refuse to furnish to said Union a copy of our current insurance program covering employees represented by said Union.

WE WILL NOT refuse to recognize and bargain with said Union as the exclusive bargaining representative of

the employees in the appropriate bargaining unit described below with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

All employees employed in our bar and culinary operations at our Sparks, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, upon request, bargain collectively with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described above, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL furnish said Union, upon request, a copy of our current insurance policy covering our employees in the above-described bargaining unit.

WE WILL remove from the personnel file of John Dyer the warning notice we issued to him on or about January 20, 1975.

SPARKS NUGGET, INC.
d/b/a JOHN ASCUAGA'S NUGGET
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415-556-0335.

United States Court of Appeals
For the Ninth Circuit

No. 77-2954

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES
& BARTENDERS UNION, LOCAL 86,
Intervenor,

v.

SPARKS NUGGET, INC., d/b/a
JOHN ASCUAGA'S NUGGET,
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Board's amended proposed judgment in the above-captioned case has this day been served upon the following counsel at the addresses listed below:

William W. Wertz, Esquire
Severson, Werson, Berke & Melchior
One Embarcadero Center
San Francisco, California 94111

Geoffrey V. White, Esquire
Davis, Cowell & Bowe
351 California Street, Suite 420
San Francisco, California 94101

ELLIOTT MOORE
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 30th day of July, 1980.

Received
Richard H. Deane
Clerk, U.S. Court of Appeals
Aug. 4, 1980
Filed 8-18-80
Dated: 8-4-80 DM

Received Aug 21 1980
Severson, Werson,
Berke & Melchior

United States Court of Appeals
For the Ninth Circuit

No. 77-2658

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES
& BARTENDERS UNION, LOCAL 86,
Intervenor,

v.

BARNEY'S CLUB, INC.,
Respondent.

AMENDED JUDGMENT

Before: KENNEDY and ANDERSON, Circuit Judges, and SCHWARTZ,* District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of an order issued by it against the Respondent, Barney's

*The Honorable Edward J. Schwartz, Chief United States District Judge for the Southern District of California, sitting by designation.

Club, Incorporated, Stateline, Nevada, its officers, agents, successors, and assigns on December 17, 1976. The Court heard argument of respective counsel on December 12, 1979, and has considered the briefs and transcript of record filed in this cause. On May 27, 1980, the Court, being fully advised of the premises, handed down its opinion granting enforcement of the Board's Order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Barney's Club, Incorporated, Stateline, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining any rule or regulation prohibiting its employees from soliciting on its premises during nonworking hours in nonpublic areas of its premises unless such prohibition is demonstrably necessary to maintain production, discipline or security.

(b) Refusing to recognize and bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, (hereinafter called the Union) as the exclusive representative of its employees in the following bargaining unit:

All employees employed by it in its bar and culinary operations at its Stateline, Nevada operations, excluding all other employees, guards and supervisors as defined in the Act.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain in good faith with the Union as the exclusive representative of its employees in the unit described above.

(b) Post at its Stateline, Nevada facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the aforesaid Regional Directors in writing within twenty (20) days from the date of this Judgment, what steps it has taken to comply herewith.

Endorsed, Judgment Filed and Entered

/s/ RICHARD H. DEANE
Richard H. Deane
Clerk

A TRUE COPY
20 AUG 1980

ATTEST:
RICHARD H. DEANE
Clerk
OSCAR TAGLE
Deputy Clerk

SO ORDERED:
JUDGES:

ANTHONY M. KENNEDY, CJ
Anthony M. Kennedy, CJ
J. BLAINE ANDERSON, CJ
J. Blaine Anderson, CJ
EDWARD J. SCHWARTZ, DJ
Edward J. Schwartz, DJ

NATIONAL LABOR RELATIONS BOARD

NOTICE TO EMPLOYEES

Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order, as Modified, of the National Labor Relations Board

An Agency of the United States Government

We hereby notify you that:

WE WILL NOT prohibit our employees from soliciting on our premises during nonworking hours in nonpublic areas of its premises unless such prohibition is demonstrably necessary to maintain production, discipline or security.

WE WILL NOT refuse to recognize and bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of our employees in the following bargaining unit:

All employees employed by us in our bar and culinary operations at our Stateline, Nevada operations, excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL recognize and, upon request, bargain in good faith with said Union as the exclusive representative of our employees in that unit.

BARNEY'S CLUB,
INCORPORATED
(Employer)

Dated .....

By .....
(Representative)
(Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Ave., San Francisco.

Barney's Club, Incorporated and Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel and Restaurant Employees & Bartenders International Union, AFL-CIO. Case 20-CA-9737

December 17, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS FANNING AND PENELLO

On February 20, 1976, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed briefs in support of the Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions[3] of

1. The Respondent's request for oral argument is hereby denied, as the record and the briefs adequately present the issues and positions of the parties. We also find no merit in the Respondent's motion to strike the Charging Party's brief on various grounds and that motion is hereby denied.

2. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

3. For the reasons set forth in *Tahoe Nugget, Inc.*, 227 NLRB 357 (1976), we agree with the Administrative Law Judge's con-

the Administrative Law Judge[4] and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Barney's Club, Incorporated, Stateline, Nevada, its officers, agents, successors and assigns, shall take the action set forth in the said recommended Order.

DECISION

Statement of the Case

Richard D. Taplitz, Administrative Law Judge: This case was heard in South Lake Tahoe, California, on October 1 and 2, 1975. The charge was filed on November 19, 1974, by Hotel-Motel-Restaurant Employees & Bartenders Union Local No. 86, Hotel and Restaurant Employees & Bartend-

---

clusion that the Union's presumption of majority status based on its recognition as the bargaining representative for the Respondent's employees as part of a multiemployer unit survived the Respondent's timely withdrawal from that unit and the shift to bargaining on a single-employer basis.

Also for the reasons set forth in *Nevada Lodge*, 227 NLRB 368 (1976), we disagree with the Respondent's contention that the Board should not assert its clearly established legal jurisdiction in this case.

4. Chairman Murphy in agreeing that the Respondent violated Sec. 8(a)(1) of the Act in maintaining the disputed no-solicitation rule does so on the ground that in her view the rule was overly, and thus unlawfully, broad. See her concurring opinion in *M Restaurants, Incorporated, d/b/a The Mandarin*, 221 NLRB 264 (1975).

Member Penello adheres to the position he took in *GTE Lenkurt, Incorporated*, 204 NLRB 921 (1973), but agrees with Chairman Murphy, for the reasons given by her in her concurring opinion in *Mandarin, supra*, that the instant no-solicitation rule which is identical to the one considered by the Board in *Mandarin* is not a "no-access" rule under the principles set forth in *Lenkurt, supra*, but is an unlawfully broad no-solicitation rule.

ers International Union, AFL-CIO, herein called the Union. The complaint and amended complaint issued on April 11 and July 31, 1975, respectively, alleging that Barney's Club, Incorporated, herein called Respondent, violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended.

ISSUES

The primary issues are:

1. Whether Respondent violated Section 8(a)(1) of the Act by maintaining a written rule prohibiting solicitation on company premises by employees after the employees' shifts, while permitting employees to remain on the premises for other purposes.

2. Whether Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union as the collective-bargaining representative of its bar and culinary employees. Subsidiary issues with regard to that allegation are:

(a) Whether the rebuttable presumption of the Union's continued majority status which flowed from a contract in a multiemployer bargaining unit survived Respondent's timely withdrawal from that unit and was applicable to a single-employer bargaining unit.

(b) If the presumption did apply, whether Respondent has rebutted that presumption by affirmatively establishing that the Union had, in fact, lost its majority or by showing that Respondent had sufficient objective bases for reasonably doubting the Union's continued majority.

A further issue is whether the Employer has engaged in any conduct tending to encourage employee disaffection from the Union.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine

witnesses, to argue orally and to file briefs.[1] Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Respondent, and Charging Party.

Upon the entire record of the case, and my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. THE BUSINESS OF RESPONDENT

Respondent is a Nevada corporation engaged in the operation of a gaming casino, bar, and restaurant at Stateline, Nevada. During the year immediately preceding issuance of complaint, Respondent's gross revenues were in excess of $500,000, and during the same year Respondent purchased goods and materials valued in excess of $10,000 which originated outside of Nevada.

Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the policies of the Act for the Board to assert jurisdiction. See *The Anthony Company d/b/a El Dorado Club,* 220 NLRB 886 (1975), and cases cited therein.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Background*

The Reno Employers Council, herein called the Association, is a Nevada corporation with an office located in Reno,

---

1. In its brief Respondent requests reconsideration of its motion to reopen its case-in-chief. For the reasons set forth in the record relating to the original motion, the request is denied.

Nevada. It is a voluntary association of employers engaged in the casino, restaurant, and other industries. The Association exists in part for the purpose of representing its member-employers in collective bargaining and in administering collective-bargaining agreements with various labor organizations, including the Union. The Union and the Association entered into a multiemployer collective-bargaining contract on August 3, 1959. The Association agreed to the contract on behalf of employers it represented in the Lake Tahoe area. Succeeding contracts followed,[2] with the last effective from December 1, 1971, through November 30, 1974.[3] That contract was between the Union and the Association on behalf of the individual members thereof signatory thereto. Five employers were signatory to the contract, including Respondent.[4] Employees covered by that contract were those in the employers' bar and culinary operations at Lake Tahoe.

On May 16, 1963, Respondent and the Union entered into a single-employer collective-bargaining agreement effective by its terms from November 30, 1962, through November 30, 1965. In the contract, Respondent recognized the Union as the sole bargaining agency for all employees employed by it in its bar and culinary operations at Lake Tahoe. At some unspecified date, Respondent joined the Association. Respondent became a party to the multiemployer bargaining agreement between the Association and the Union, which was effective from November 30, 1965, through November 30, 1968. Respondent continued to be a party to the succes-

---

2. In some of those contracts new member-employers of the Association were added and other employers were deleted.

3. Nevada is a right-to-work State and none of the contracts contain a union-security clause.

4. The signatory employers were Barney's Club, Harvey's Resort Hotel, Nevada Lodge, Sahara-Tahoe and Tahoe Nugget.

sive multiemployer collective-bargaining contracts through the one that expired on November 30, 1974.

On August 30, 1974, Respondent timely withdrew its membership from the Association.[5]

On October 24, 1974, Respondent refused to bargain with the Union, and Respondent has withdrawn recognition from the Union. On July 25, 1975, Respondent filed a petition for an election with the Board. That petition sought an election among Respondent's culinary and bartender employees in a single-employer unit. The complaint alleges a refusal to bargain in that single-employer unit. The complaint alleges, the answer as amended admits, and I find that the appropriate bargaining unit is:

> All employees employed by the Respondent in its bar and culinary operations at its Stateline, Nevada, operations, excluding all other employees, guards, and supervisors as defined in the Act.

B. *The No-Solicitation Rule*

1. The facts

On about July 22, 1974, Respondent posted a no-solicitation rule on its front door. The posting was authorized by Robert G. Berry, Respondent's chief executive officer.[6] The posted rule enunciated a policy that had been in existence for at least 4 years prior to July 22, 1974.[7] The part of the

---

5. The General Counsel concedes in its complaint that the withdrawal was timely.

6. Berry is also vice president of Respondent and a member of its board of directors.

7. These findings are based on a stipulation of the parties. There is no evidence in the record that the employees were aware of the rule before the posting. Respondent offered no evidence that would indicate that the rule was necessary to maintain discipline or production.

rule that is alleged to be violative of the Act states:[8]

> Based upon long established rules, your attention is called to the folowing:
>
> • • • • •
>
> Solicitation on company premises by employees after employees shift has been completed is prohibited.
>
> • • • • •
>
> Violation of any of the above rules will result in immediate disciplinary action, including discharge.

Respondent permitted employees to come on to its premises after their shifts. Indeed, such a practice was encouraged in that Respondent customarily allowed employees to have a free drink at its bar after they had completed a shift. Employees often sat at the bar for extended periods when they were off shift and spoke among themselves and with supervisors. Sometimes the employees were in uniform and sometimes they were not. In general, Respondent considered off-shift employees to be members of the public who were welcome to use its facilities.

Respondent did not maintain an employees' lounge or rest area. The only area in Respondent's facility that was reserved for off-shift or off-duty employees was a single table, that seated about eight people, in its public restaurant. That table was about 4 feet away from the next table at which customers sat and customers could overhear what was being said at the table reserved for employees. That

---

8. The rule also reads:

> Solicitations of any type by employees during working time is prohibited.
>
> • • • • •
>
> Distribution of literature of any type or description by employees during working time is prohibited.
>
> Distribution of literature of any type or description in working areas is prohibited.

table was generally used by employees during their break periods and was seldom used by off-shift employees.

Respondent maintained the no-solicitation rule by posting it and thereby notifying the employees that it was currently in force. The rule provided on its face that a violation would result in immediate disciplinary action, including discharge. There is no contention that anyone was disciplined for violation of the rule. Off-shift employees did engage in a number of different types of solicitation on Respondents' premises, and Respondent took no action against those solicitations.

As to some types of solicitations, there is no evidence in the record that Respondent knew they were taking place. In that category are sale of Avon products and shoes by employees to other employees and invitations by employees to other employees to attend parties.[9] With regard to two types of solicitation, Respondent did have knowledge. Those related to the sale of Elks Club raffle tickets and the participation by employees in football and baseball gambling pools.

Al Labendz, who was employed by Respondent as a bartender from about 1967 through part of 1969 and then

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9. Al Labendz, who was a bartender for Respondent from about 1967 through part of 1969 and again from 1970 through July 1973, credibly testified that he saw off-duty employees selling Avon products on the premises during both his periods of employment and that at sometime in 1971 or 1972 he bought a pair of shoes from another employee on the premises. He also averred that he didn't know whether the people showing the Avon products and selling the shoes made any attempt to conceal their action from management, and he didn't know if management knew about the sales. Labendz and Gary Powers, who was a bartender for Respondent from July 1973 to November 1974, credibly testified that on a number of occasions employees on the premises invited them to parties. Even if such invitations could be considered solicitations within the compass of the no-solicitation rule, there is no evidence that Respondent knew of them.

again from 1970 through July 1973, credibly testified that, two or three times a year during the time he was employed, he sold Elks Club raffle tickets to employees, supervisors, and customers on the premises. At times he sold as many as 80 or 100 tickets. Each time a raffle was held, he solicited then General Manager Lewis and then Assistant General Manager Source. Some of the employees he sold the tickets to were on duty and others were off duty. He also sold the tickets to Barney O'Malia, who at one time was owner of the club, and to Eugene Terry, who at one time was bar manager.

Labendz credibly testified that a football pool was held every week during the fall up to his termination in 1973. Records of the pool were maintained on a card which was kept in the cashier's cage, and supervisors participated in the pool, including Lewis, Source, Keno Boss Bill Coombs, and Pit Bosses Lorin Phoenix and Vern Pratt. Gary Powers, who was a bartender from July 1973 to November 1974, credibly testified that most of the employees participated in baseball and football pools after their shifts ended and that supervisors participated. He personally asked employees to participate. He participated in a world series pool in the fall of 1974 and sold chances to off-duty employees. As late as a few weeks before the hearing, one of the bartenders offered Union Business Representative Howard Lawrence a chance to get in the football pool while Lawrence was visting the premises.

2. Analysis and conclusions with regard to the no-solicitation rule

The right of employees to self-organization has often come into conflict with the right of employers to maintain discipline in their establishments and to control the use of their property. Over the years, the Board and the courts

have attempted to reconcile these conflicts through the formulation of rules of law which attempt to maximize the scope of the rights of each to the extent that they do not unduly diminish the rights of the other. *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793 (1945); *N.L.R.B. v. Babcock & Wilcox Company*, 351 U.S. 105 (1956). In drawing guidelines in this area the United States Supreme Court has held: "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *N.L.R.B. v. Babcock & Wilcox Co., supra* at 113. In *N.L.R.B. v. United Steelworkers of America, CIO* [*Nutone*], 357 U.S. 357 (1958), the Supreme Court noted that "mechanical answers" do not solve "this non-mechanical, complex problem in labor management relations." However certain guidelines have been well established. In attempting to reconcile the legitimate interests of both employers and unions, the Board has looked at the nature of the business. Thus, the rules which have evolved relating to industrial establishments[10] have not been applied to retail stores. Because active solicitation in a sales area may disrupt the retail store's business, an employer may legally prohibit distribution and solicitation by employees and nonemployees on the selling floor even during the non-working time of the employees. *May Department Stores Co.*, 59 NLRB 976 (1944), enfd. 154 F.2d 533 (C.A. 8, 1946); *Marshall Field & Co.*, 98 NLRB 88 (1952), enforcement denied in part 200 F.2d 375 (C.A. 7, 1952). In *Marshall Field*, the Board was faced with the question whether a public restaurant within a department store should or should not be considered a sales area within which

10. See *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962).

employees could be prohibited from soliciting. The Board answered the question in the negative, holding: "The Board does not agree with the Respondent's general contention that prohibition of all solicitation in public restaurants is lawful."[11]

In the instant case Respondent operates a gambling casino, bars, and a public restaurant. The gambling establishment is analogous to a retail store for the purposes of the no-solicitation rule. Thus, Respondent could lawfully ban all solicitation in the gambling area, but it could not lawfully maintain a general ban on solicitation in the public bars or restaurant. In that the no-solicitation rule in question applies equally to the gaming area, the bars, and the public restaurant, the legal principles applicable to the lawful limitation of soliciting on the sales floor of a department store do not apply.

In *GTE Lenkurt, Incorporated,* 204 NLRB 921 (1973), the Board found to be lawful a no-solicitation rule that read: "An employee is not to enter the plant or remain on the premises unless he is on duty or scheduled for work." The Board stated:

> Under well-settled principles applicable to employee activities . . . an employer may not, absent special circumstances, prohibit employees lawfully on the premises from engaging in union solicitation on their own time. However, it is also well settled that nonemployees are not entitled to enter an employer's premises to engage in union activity there. Accordingly, to dispose

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11. In *N.L.R.B. v. Magnavox Company of Tennessee,* 415 U.S. 322 (1974), the Supreme Court held:

> The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long as the in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute § 7 rights.

> of the issue here, we must determine which of these principles applies to an off-duty employee, i.e., whether, nonwithstanding an employer rule to the contrary, he has a right to enter or remain on an employer's premises if he wishes to do so for this purpose.
>
> In our view he does not, for his status is more nearly analogous to that of a nonemployee, and he is subject to the principles applicable to nonemployees. [Footnotes omitted.]

In *Lenkurt*, the Board was dealing with a total exclusion of off-duty employees from respondent's nonretail premises. In *M Restaurants, Incorporated d/b/a The Mandarin*, 221 NLRB 264 (1975), the Board considered a situation where off-shift employees were allowed to enter a restaurant's premises for limited purposes. In that case, the no-solicitation rule read: "Solicitation on company premises by employees after employees' shift has been completed is prohibited." The Board distinguished the *Lenkurt* situation and ruled that the no-solicitation clause was invalid, holding:

> The rule in the instant case was directed solely at employee solicitation. In fact Respondent permitted off-duty employees to wait for fellow employees to finish work, to pick up their paychecks on their days off, and to return to the premises to eat with their coworkers. Under these circumstances and particularly in view of the majority's holding in *Lenkurt*, it is evident that even under the standard enunciated in that case Respondent's no-access rule is presumptively invalid and unlawful.

In the instant case the no-solicitation rule is identical to the one considered by the Board in the *Mandarin* case. As in the *Mandarin* case, Respondent's employees were permitted to come on to Respondent's premises when they were off shift. They were encouraged to do so by Respondent in that Respondent gave them free drinks after shift. They were

allowed to remain at the bar and to use Respondent's facilities. In addition, Respondent knew that off-shift employees were participating in sports pools and employees had been solicited to purchase Elk's Club raffle tickets. Respondent made no effort to limit those activities. There is no evidence that the rule was known to employees before the posting. The rule was posted after the Union's renewed organizational activity. Respondent offered no evidence to establish that it's rule was necessary to maintain production or discipline.[12]

Respondent cannot justify its no-solicitation rule on the ground that no one was disciplined under it. It was enforced in that employees were warned by the very wording of the rule that they would be disciplined for its violation. As the Board stated in *The Great Atlantic & Pacific Tea Company, Inc.*, 162 NLRB 1182, 1884 (1967):

> . . . we reject the Respondent's argument that the rule could have had no coercive effect since it was not enforced. It is well established that the mere existence of an unlawful no-solicitation rule makes it susceptible to application to employees and this factor alone tends to coerce, restrain, and interfere with their right to engage in self-organizational activities. [Footnote omitted.]

I find that the principles enunciated in the *Mandarin* case are controlling and that Respondent violated Section 8(a)(1) of the Act by maintaining the no-solicitation rule.

C. *The Refusal To Bargain*

1. The facts

a. *The testimony of Staff*

Alfred E. Staff is the bar manager for the Overland Hotel in Reno. From early July 1973 until the summer of

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12. Cf. *Florida Steel Corporation*, 215 NLRB 97 (1974).

1974, when a trusteeship was imposed on the Union, Staff was president of the Union. During that time, Staff, in addition to being union president, was a full-time bartender. The only full-time paid union officer was Secretary-Treasurer and Business Manager E. W. Tucker. The following findings are based on the credited testimony of Staff.

During the summer of 1974, the Union had about $11,000 in its treasury and that amount was decreasing. However, the Union's liabilities did not exceed its assets. The Union had approximately 1,000 members, of whom between 700 and 800 were paid up in their dues.[13] In the spring of 1974, the Union sent Business Manager Tucker to the headquarters of the International in Cincinnati to see if he could obtain money to help the Union organize. The executive committee of the Union had discussed the need to obtain more members and to build up the membership to a point where the Union could have some strength when it met with the Employers to negotiate the next contract. Tucker went to Cincinnati and discussed the matter with representatives of the International. He then returned and reported to the executive committee that the International would give the Union money to organize if the officers resigned, the Union went into trusteeship, and the International administered the Union. The executive committee decided to let the International take over. The matter was brought up at the next regular meeting of the Union, and a majority of the membership voted to accept the trusteeship. The officers resigned

13. At another point in his testimony, Staff averred that there were about 700 to 750 paid-up members and in addition there were about 150 other people who were on the membership rolls who were not paid up, but who were not suspended. The highest number of members during Staff's term of office was about 1,200.

and the trusteeship was imposed sometime during the summer of 1974.[14]

During the summer of 1974, Tucker told Staff that there were about 30,000 employees in the Lake Tahoe and Reno areas who were employed in categories over which the Union had jurisdiction.

Conversations with Tucker and Staff's review of membership records led Staff to believe that of the approximately 900 or 1,000 union members in May 1974, about 20 percent were in the Lake Tahoe area and the balance were in Reno. Staff appeared confused in his testimony with regard to the distinction between union members and employees represented by the Union. His testimony, read as a whole, clearly indicates that when he was referring to the approximately 900 or 1,000 employees and to the 20-percent figure, he was referring to members and not to all employees who were represented through coverage by outstanding contracts.

In the spring of 1974, the Union placed announcements in local newspapers stating that the Union would hold a meeting to discuss with employees what it would ask in contract negotiations and to see if it could get more people interested in an expansion of the Union. The employees invited were those in the Lake Tahoe area. No employees showd up for the scheduled meeting and it was not held.

During the time that he was president, Staff spoke to some union bartenders whom he worked with at the Overland Hotel in Reno and he received comments from them to the effect that they were discouraged with the Union, that the Union didn't do anything for them, and that they did not like the way the Union was being run. Some bartenders said: "When is the Union going to be able to do anything for us," "They never do nothing for us," and

14. Staff testified that the officers resigned in July or August 1974, but later in his testimony he averred that the trusteeship might have been imposed in June.

"What's the sense of joining a Union." He never received any compliments on the performance of the Union. In addition to talking to bartenders at the Overland Hotel, he spoke to some culinary workers at various clubs in the Reno area in an attempt to organize them. However, there is no evidence in the record that any employees of Respondent expressed dissatisfaction with the Union to Staff.

Staff did not communicate any of the matters related above to Respondent and there is no indication in the record that Respondent knew of the substance of those matters at the time that it refused to bargain with the Union.

Apparently Respondent is relying on Staff's testimony solely for the purpose of attempting to prove that the Union, in fact, did not have majority status.[15] With regard to the matters set forth below, Respondent contends that it did have a reasonably based doubt as to the Union's majority, upon which it acted in withdrawing recognition.

b. *Remarks by employees of Respondent, conversations between supervisors, and the newspaper articles*

In October 1974, Respondent had in its employ about 40 employees in bar and culinary classifications.[16] In mid-

15. As the Board held in *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho, and its Employer-Members*, 213 NLRB 651 (1974), an employer's reasonably based doubt of the union's majority status must be predicated on information it had at the time of its refusal to bargain. See also *Orion Corporation*, 210 NLRB 633 (1974), enfd. 515 F.2d 81 (C.A. 7, 1975).

16. This finding is based on the credited testimony of Respondent's assistant general manager, N. Darl Voss. Robert G. Berry, who is Respondent's chief executive officer, board member, and vice president, has less daily contact with the employees than Voss. Berry testified that the number of bar and culinary employees in the summer is about 40 to 50, in the fall, 30 to 35, and in the winter about half that of the summer.

August 1974 Respondent made a determination that the Union did not represent a majority of its bar and culinary employees. However, Respondent continued its investigation concerning the Union's majority from July 1974 until it authorized its attorney to send a letter dated October 24, 1974, in which the Union was notified that Respondent doubted the Union's majority status.[17]

The decision to question the Union's majority status was made by Respondent's chief executive officer, Robert G. Berry. Berry received some direct and indirect reports concerning the attitude of some of his employees toward the Union.

Sometime between July 15 and the latter part of August 1974, Berry spoke to a waitress named Pam, whose last name he could not remember. She told him that she had never seen a union person at the Club and didn't want any part of the Union. Sometime between July 15 and late August 1974, Berry spoke to a bartender named Barry, whose last name he could not recall. He had no specific recollection of what that employee told him about the Union. Sometime before August 30, Berry spoke to a waitress named Connie, whose last name he could not remember. She told him that she was not interested in being represented by the Union.

Sometime in August or September 1974, Respondent's assistant general manager, N. Darl Voss, had a conversation with employee Elmer Willsey. Willsey told Voss that there had been someone from the Union contacting them, trying to get them to join the Union. Willsey also said that he had dealings with those people before and that he did not want anything to do with them. Voss reported the incident to Respondent's general manager, Harry Bay. In

17. These findings are based on the testimony of Berry.

September or October 1974, Bay himself had overheard Willsey tell someone else: "Damn those unions—I wish they's stay out of here, so I can get my work done." Both these incidents were reported to Respondent's chief executive officer, Berry.

Sometime between September through October 1974, Voss spoke to employee Mitch Roskin. Roskin said that a union representative had offered to pay his initiation fees and dues if he would recruit other employees to join the Union. Roskin also told Voss that he had dealings with the Union in the east and he was not too happy with them. Voss reported the conversation to Bay who in turn reported it to Berry.

Berry testified that he was told about a Mitch and an Elmer, neither of whose last names he could recall, by Bay. He also averred that he spoke to Voss and Bar Manager Robert Badertscher about employees. He testified that between July 15 and October 1974 Voss told him that, based on his (Voss') investigation, he was of the opinion that the Union did not represent a majority of the bar and culinary employees.

Between July and October 24, 1974, Bar Manager Badertscher told Voss that he (Badertscher) felt the people in the bar were not interested in being represented by the Union and that they were all happy with the conditions as they were. Voss reported that comment to Berry.[18]

In August 1974, Badertscher told Bay that in his (Badertscher's) opinion, people who worked under him did not want the Union to represent them. Bay credibly testified that Badertscher did not tell him the basis for that opinion. Bay reported the conversation to Berry. Also in August 1974 Voss told Bay that he (Voss) didn't think the

18. These findings are based on the credited testimony of Voss.

Union had a majority at the Club. Bay reported that to Berry.

About late June or early July 1974, Berry read certain articles in the Reno Evening Gazette and the Tahoe Tribune which stated that there was a trusteeship. He saw in the papers advertisements by International Trustee Bramlet concerning organizational meetings which were to be held. Berry was also informed about the trusteeship by his attorney.[19]

c. *The decision to withdraw recognition*

Respondent acknowledges that on or about October 24, 1974, it refused to bargain with the Union and that it has withdrawn recognition from the Union. Respondent contends that at the time it refused to bargain it had sufficient objective bases for reasonably doubting the Union's continued majority.

The remarks of certain employees concerning their attitude toward the Union and various conversations between supervisors relating to the employee's attitudes are discussed above. Also, as indicated above, Berry obtained information concerning the Union's trusteeship and the financial difficulties of the Union. In addition, Berry knew that Nevada is a right-to-work State and the contracts did not contain a union-security clause. He credibly testified that he had no knowledge of any election ever having been held among the employees.

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19. Berry testified that he understood from several sources that a trusteeship was imposed because of the Union's inadequate funds, lack of membership, and lack of cash flow to conduct operations. When asked the sources of his belief, he testified that his opinion was based on such matters as his obeservation of the poor business practices of the Union and lack of interest by employees in the Union. He also referred to certain newspaper articles and advertisements he had read.

Sometime prior to October 24, 1974, Berry had a conversation with his law partner, George Allison. Allison had represented another employer, Harvey's Casino, in a state court proceeding, Allison told Berry that during that proceeding a union representative said that he did not know how many people the Union represented at the Lake and that the union representative refused to disclose the actual membership of the Union among people at the Lake.

Respondent also adduced considerable evidence concerning the turnover of its employees and the Union's activity or lack thereof. Between July and October 1974, Berry, Bay, and Voss often discussed the amount of turnover among Respondent's employees. During that period the highest number of culinary and bar employees was about 50. Voss testified that from his observation of the employees who were physically present, he concluded that there was about a 50-percent turnover between June and October 24, 1974. Bay testified that from July to the end of October 1974 the turnover rate among bar and culinary employees was 4 or 5 to 1. Berry testified that during the summer there was a complete turnover of culinary employees about every 2 months and a turnover of bar employees somewhat less frequently. He averred that his data on turnover was based on transaction sheets that he examined every day, on reports from the supervisors, and from his observation of employees on the premises. Respondent did not offer any records in this regard and there was no testimony concerning the classifications of the employees who most frequently left Respondent's employ. However, I credit the testimony of Respondent's witnesses to the extent that they averred that there was a very substantial amount of turnover among Respondent's bar and culinary employees.

In late June or early July 1974, Berry attended a meeting of the Association. Berry had been paying dues to the Association and he knew that Respondent was a member. At the meeting, Association Official Knoll told the employer-members that the union contract was going to be renegotiated that fall. Berry testified that until that meeting he did know that Respondent had a contract with the Union. On May 10, 1973, Berry and others purchased a majority of the shares of Respondent. From August 3, 1973, to the present Berry has been a member of the board of directors, vice president, and chief executive officer of Respondent. For about 5 years before 1973, Berry represented Respondent as its attorney. Shortly after Berry took over management of Respondent, he received bills from the Association which he paid. Respondent was a party to successive collective-bargaining agreements with the Union from May 16, 1973, through November 30, 1974. I do not credit Berry's assertion that he acquired a substantial ownership interest as well as managerial control of Respondent without looking into and knowing of Respondent's contractual obligations. This is particularly true as Berry had previously represented Respondent as its attorney. However, Berry did credibly testify that he had no contact of any kind with the Union from the time that he physically took over Respondent on May 10, 1973, until the Association meeting in late June or early July 1974.[20] He also credibly testified that he knew that from July 15 through August 30, 1974, several organizers came into Respondent's premises and that thereafter organizers continued to come on the premises. Until the middle of the summer of 1974 he never saw or discussed any union business with a union agent.

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20. It thus appears that during that period of time the Union filed no grievances.

Bay was employed by Respondent as its slot machine manager on June 1, 1973, and was made general manager on August 23, 1973. Bay credibly testified that until sometime in the summer of 1974 he never saw a union representative on the premises.

Voss was employed by Respondent as assistant general manager in August 1973. He credibly testified that prior to July 1974 he had not heard employees speak about the Union on the premises and he had not seen a union agent there. In July 1974 he spoke to Bay about union activities inside the Club. He told Bay that there were people from the Union trying to contact some of the employees to join the Union.

Voss testified that as of May 1974 he was not aware that there was a union representing the bar and culinary employees and that he had no knowledge of any collective-bargaining agreement. Bay testified that he became aware that Respondent was unionized sometime during the summer of 1974. As indicated above, Berry testified that he was not aware of that fact until late June or early July 1974. I am unable to credit Berry, Bay, or Voss in that regard. All three were intimately familiar with the bar area of the premises. Posted conspicuously over the bar was a sign[21] that read: "Hotel and Restaurant Employees and Bartenders International Union affiliated with AFL-CIO recognizes this house as a union house and worthy of the support of organized labor." Berry's explanation of the sign is completely unconvincing. He averred that the sign related to specialized customer treatment for union members and that anyone who showed a union card could get a free drink. Harry Eve, who has been Respondent's bar manager

21. Union Business Representative Lawrence credibly testified that union records show that the sign was first posted about 1968.

since May 1975, testified that the sign was about 8 or 10 feet from where customers would be seated, that the sign was discolored from grease and smoke, and that customers, from where they were seated, would only be able to see the large printing which read "union house." However, Berry, Bay, and Voss were not restricted to customers' tables and their business would carry them to all parts of Respondent's premises.

When Berry was at the Association meeting in late June or early July, he asked for a copy of the union contract and one was sent to him. He testified that when he read the contract he saw a number of very serious violations of the contract by Respondent which had never been called to his attention or to the attention of his managers. He did not indicate the nature of the violations.

Robert Vickney was a union business agent from 1970 through part of 1972. During that time he visited Respondent's premises at least twice a week and spoke to employees about their working conditions. In 1972 one of Respondent's bartenders told him that certain employees did not receive holiday pay for two holidays. Vickney spoke about the matter to one of Respondent's owners but no written grievance was filed. He never filed any written grievances.

Al Labendz was a bartender for Respondent from 1970 to mid-1973. Labendz belonged to the Union and kept his union book in a jar by the cash register. That jar was used by barboys and bartenders for the union books. Periodically, a business representative came on to the premises, took money that was left in the union books, and stamped receipts in the books. Labendz credibly testified that about 90 percent of the bartenders and barboys had union books which they kept in the jar and that he personally observed

12 to 15 books in the jar. He credibly testified that some of the supervisors including Tom Pavich, who was bar manager in 1971, knew about the books. He also credibly averred that during the time he was working there, he saw a union business agent on the premises about twice a week.

There is no evidence that the Union engaged in any particular activities at the Respondent's premises from mid-1973 until early summer 1974. Between July and the first part of October 1974, Union Business Representative Howard Lawrence visited the premises about twice a week to enforce the contract and receive complaints from employees. After October he visited the premises about twice a month. Berry credibly testified that in the period between July 15 and August 30, 1974, several union organizers came onto the premises. Voss credibly testified that in July 1974 people from the Union were trying to contact some of the employees to join the Union.[22]

d. *The Union's demand for negotiations and Respondent's refusal*

The last contract expired by its terms on November 30, 1974. By letter dated July 22, 1974, Union International Trustee Al Bramlet notified Respondent of his desire to modify and change the contract and sought to arrange for collective-bargaining negotiations. By a letter to the Association dated August 30, 1974, Respondent withdrew its

22. Union Business Representative Lawrence testified that in mid-August 1974 he spoke to Respondent's beverage manager, Badertscher, about a complaint made by employee Hampton. It was stipulated that if Badertscher was called to testify he would have denied any conversation with Lawrence concerning an alleged grievance of Hampton. Lawrence acknowledged that no written grievance was filed. The incident took place in mid-August 1974, which was well after the Union had become active on Respondent's premises. The incident adds little to the record and need not be considered further.

authorization for the Association to represent it in connection with collective-bargaining or labor relations. A copy of that letter was sent to the Union, with a covering letter dated August 30, 1974, notifying the Union that Respondent terminated the collective-bargaining agreement effective as of the end of the term thereof. By letter dated September 3, 1974, Phillip Bowe, the Union's attorney, acknowledged receipt of Respondent's August 30, 1974, letter and requested that Respondent contact Bramlet to discuss a convenient time and place for negotiations. By letter dated October 18, 1974, Bowe demanded that Respondent begin negotiations. By letter dated October 24, 1974, Respondent's attorney, Nathan Berke, reminded the Union that Respondent had timely withdrawn from the multiemployer group and was handling its own collective bargaining. Berke wrote that he would treat the Union's correspondence as a request for Respondent to engage in bargaining on an individual employer unit basis. The letter went on to state: "At the direction of our client, this is to inform you that our client has a genuine doubt that your Local continues to represent an uncoerced majority of its employees in an appropriate unit. If, following a validly conducted election under the aegis of the National Labor Relations Board, your Local is selected as the bargaining agent, our client will at such time fulfill whatever legal obligation it may then have."

The Union filed the unfair labor practice charge on November 19, 1974, in which it alleged that Respondent unlawfully refused to recognize and bargain with it. Respondent admits that commencing on or about October 24, 1974, it has refused to bargain collectively with the Union and has withdrawn recognition from the Union. On July 25, 1975, which was about 9 months after the refusal to

bargain and about 8 months after the filing of the charge, Respondent filed a petition for an election with the Board.

2. Analysis and conclusions with regard to the refusal to bargain[23]

a. *The presumption of majority*

As the Board held in *Walter E. Heyman d/b/a Stanwood Thriftmart,* 216 NLRB 852 (1975):

> A contract, lawful on its face, raises a presumption that the contracting union was the majority representative at the time the contract was executed, during the life of the contract, and thereafter.[2]

2. *Shamrock Dairy, Inc.,* 119 NLRB 998, 1002 (1957), and 124 NLRB 494, 495-496 (1959), enfd. 280 F.2d 665 (C.A.D.C.), cert. denied 364 U.S. 892 (1960).

In the instant case, the asserted presumption of continued majority status is based on an initial contract in a single employer unit, which contract was effective from November 30, 1962, through November 30, 1965, and on successive contracts in a multiemployer bargaining unit from November 30, 1965, through November 30, 1974. The complaint alleges a refusal to bargain in a single-employer bargaining unit. No presumption of continued majority can flow directly from the original contract that expired in 1965. If any such presumption is warranted it must flow from the recently expired contract which was in a multiemployer unit. A serious question is presented as to whether the presumption of continued majority which flowed from the existence of that multiemployer contract survived the withdrawal of

23. Much of the legal analysis set forth below is the same as that which is contained in my decision in *Sahara Tahoe Corporation, d/b/a Sahara Tahoe Hotel* [229 NLRB No. 151 (1977)], and *Tahoe Nuggett, Inc., d/b/a Jim Kelley's Tahoe Nuggett* [227 NLRB 357 (1976)], cases that involved many of the same legal principles.

respondent from the multiemployer unit and can be applied to the recreated single-employer unit.

In *Downtown Bakery Corp.,* 139 NLRB 1352 (1962), enforcement denied in pertinent part 330 F.2d 921 (C.A. 6, 1964), a successor employer refused to bargain with a union where that union was the Board-certified representative of the employees in a multiemployer bargaining unit which included a predecessor employer. In that case, the predecessor employer had signed a separate collective-bargaining agreement with the union. Relying on a presumption of continued majority, the Board found that the successor employer violated Section 8(a)(5) of the Act by refusing to bargain with the union in the single-employer unit. The court refused to enforce the Board's bargaining order, holding in part that there was not sufficient evidence in the record to support a finding of majority status of the union.

In *The Richard W. Kaase Company,* 141 NLRB 245 (1963), enforcement denied in pertinent part 346 F.2d 24 (C.A. 6, 1965), a similar factual pattern was presented, and the Board followed its *Downtown Bakery Corp.* precedent. In *Richard W. Kaase Co.,* a union was certified as the collective-bargaining agent of the employees of employers in a multiemployer bargaining unit which included a predecessor employer. That employer executed a separate collective-bargaining agreement. Thereafter, a successor employer continued to recognize the predecessor's contract but later withdrew recognition. The Board found that the successor violated Section 8(a)(5) of the Act. The court once again refused to enforce the Board's order, holding: "the ambiguity inherent in the multi-employer election here relied on vitiates its efficacy to prove a majority as to any single employer."

The Board law established by the *Downtown Bakery* and *Richard W. Kaase Co.* cases is not directly applicable to the

instant situation. In each of these cases, the individual employer had signed separate collective-bargaining contracts with the union and the presumption of continued majority could flow from those contracts rather than from the multiemployer certification. In the instant case, the collective-bargaining relationship since 1965 was in a multiemployer bargaining unit and the contracts to which Respondent was a party since then were multiemployer bargaining contracts.[24] However, I believe that the presumption of continued majority flowing from the multiemployer contracts requires a derivative presumption of the Union's majority status which is applicable to each of the employer-members of the multiemployer bargaining unit separately. Unless a majority of an employer's employees desire representation by a union, that employer may not lawfully force representation on them by joining a multiemployer bargaining arrangement. *Mohawk Business Machines Corporation,* 116 NLRB 248 (1956); *Dancker & Sellew, Inc.,* 140 NLRB 824 (1963), enfd. 330 F.2d 46 (C.A. 2, 1964). Respondent would have violated the Act in 1962 when it became party to the single-employer collective-bargaining agreement if a majority of its employees did not desire representation. Respondent would have again violated the Act in 1965 when it became a party to the multiemployer bargaining agreement if a majority of its employees did not desire representation at that time. Any unfair labor practice charge relating to such violations would have had to have been filed within 6 months from the violation. Respondent may not now either attack the initial bargaining relation in the single-employer unit or the subsequent bargaining relation in the multiemployer unit. Nor may Respondent use

24. It is also noted that, unlike the instant situation, both those cases involved conflicting representational claims by rival unions.

such matters to establish a defense to the refusal to bargain complaint. As the Board held in *North Bros. Ford, Inc.*, 220 NLRB 1021 (1975):[25]

> Section 10(b) of the Act confines the issuance of unfair labor practice complaints to events occurring during the 6 months immediately preceding the filing of a charge and has been interpreted by the Supreme Court to bar finding any unfair labor practice, even though committed within that period, which turns on whether or not events outside that period violated the Act. *Bryan Manufacturing Co.*[3] The Court, holding that maintenance and enforcement of a contract more than 6 months after recognition of a minority union did not violate the Act, relied in part on the legislative history indicating that Congress specifically intended Section 10(b) to apply to agreements with minority unions in order to stablize bargaining relations. Noting that labor legislation traditionally entails compromise, the Court observed
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> > that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the overall purpose of the Act to secure."[4]
>
> The Board, in light of *Bryan*, has since held that Section 10(b) is applicable to a refusal-to-bargain defense that the bargaining relation was unlawfully established.[5]

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3. *Local Lodge No. 1424, IAM, AFL-CIO* [*Bryan Manufacturing Co.*] *v. N.L.R.B.*, 362 U.S. 411 (1960).

4. *Id.* at 428, citations omitted.

5. *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom. Tragniew, Inc., and Consolidated Hotels of California v. N.L.R.B.*, 470 F.2d 669 (C.A. 9, 1972); *Roman Stone Construction Company, and Kindred Concrete Products, Inc.*, 153 NLRB 659, fn.3 (1965).

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25. See also *Stanwood Thriftmart, supra.*

Respondent may not, at this late date, attack either the initial recognition of the Union by Respondent or the initial contract in either the single- or multi-employer units. It cannot defend against the refusal-to-bargain complaint on the ground that those contracts were entered into at a time when the Union did not represent a majority of the employees of Respondent. Nor can it defend on the ground that the Union did not represent a majority of the employees in the overall multiemployer bargaining unit. Those contracts must be considered valid on both those grounds. The presumption of majority status which continued over the years based on successive contracts applies both as to the employees of Respondent and to the employees in the multiemployer unit. I therefore find that the General Counsel has properly relied on that presumption to establish the Union's majority in the unit in question. It remains to be considered whether Respondent has successfully rebutted that presumption.

b. *The attempt to rebut the presumption*

(1) The background law

In *James W. Whitfield, d/b/a Cutten Supermarket*, 220 NLRB 507, 508 (1975), the Board summarized the existing law, holding:

> It is well settled that Section 8(a)(5) and Section 8(d) of the Act require an employer to recognize and bargain in good faith with the bargaining representative selected by a majority of its employees. That recognition establishes a presumption of majority status which, in circumstances such as this, may be rebutted.[6] The employer may lawfully refuse to bargain with the union if it rebuts the presumption by affirmatively establishing that the union has in fact

6. Cf. *N.L.R.B. v. Frick Company*, 423 F.2d 1327 (C.A. 3, 1970); *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966).

lost its majority status, or shows that it has sufficient objective bases for reasonably doubting the union's continued majority status.[7] To establish sufficient objective bases, however, requires more than the mere assertion thereof based upon the employer's subjective frame of mind.[8] Furthermore, the employer must not have engaged in any conduct tending to encourage employee disaffection from the union.[9]

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7. *Celanese Corporation of America*, 95 NLRB 664, 672 (1951); *Peoples Gas System, Inc.*, 214 NLRB 944 (1974).

8. *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965), enforcement denied 359 F.2d 799 (C.A. 7, 1966); *Automated Business Systems, Inc., a Division of Litton Business Systems, Inc.*, 205 NLRB 532 (1973), enforcement denied 497 F.2d 262 (C.A. 6, 1974).

9. *Peoples Gas System, Inc., supra.*

In *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Assn. of Pocatello, supra,* 213 NLRB at 652, the Board held that these principles are equally applicable whether the union was certified by the Board or was recognized without Board certification. In that case, the Board held that the existence of a prior contract, lawful on its face, raised a presumption that the union was the majority representative at the time the contract was executed and also raised the presumption that the union's majority continued at least through the life of the contract. The Board held that "Following the expiration of the contract... the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so...."

(2) The alleged actual loss of majority

For the reasons set forth above, the presumption of continued majority which flowed from the contract survived the change in the bargaining unit and applied to the

single-employer unit. It follows that the change in the unit is not in itself proof that the Union no longer represented a majority of Respondent's employees.

During the summer of 1974 the Union had about $11,000 in its treasury and that amount was decreasing. However, the Union's liabilities did not exceed its assets, and even if they did the Union's financial condition would not indicate how many employees the Union actually represented. Even if Staff were correct in his estimate that there were about 30,000 employees in the Lake Tahoe area who were employed in categories over which the Union had jurisdiction, that figure would not give any insight into how many employees the Union in fact did represent.

About that time the Union had approximately 900 or 1,000 members, of whom perhaps 20 percent were from the Lake Tahoe area. Between 700 and 800 were paid up in their dues. Those are industrywide figures and there is no way to tell from them how many of Respondent's employees were union members. Even if Respondent had established that a majority of its employees were not members of the Union, such a showing would not be the equivalent of establishing a lack of desire of those employees for union representation. Employees may desire representation without wanting to join a union or pay dues. *Orion Corporation,* 210 NLRB 633 (1974), enfd. 515 F.2d 81 (C.A. 7, 1975). As the Board stated in *Wald Transfer & Storage Co.,* 218 NLRB 592 (1975):

> It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the Union may not choose

to give it their financial support *or* participate as members.[3]

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3. See *Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929; *N.L.R.B. v. Gulfmont Hotel Company*, 362 F.2d 588, 592 (C.A. 5, 1966).

The fact that employees in the industry at the Lake did not attend a union meeting after announcements were placed in newspapers may indicate some apathy on the part of employees who happened to see the announcements. It does not indicate that a majority of Respondent's employees no longer desired to be represented by the Union.

The Union sought funds from the International to organize employees in the industry and to build up its membership so that it would have strength in negotiating the next contract. The Union also accepted International trusteeship. Those facts, however, do not indicate whether or not the Union represented a majority of Respondent's employees. The Union wanted to obtain more members in the industry and it engaged in some internal revisions, but it would be sheer speculation to make an evaluation based on those facts as to the number of Respondent's employees the Union actually represented.

Some of the bartenders at the Overland Hotel in Reno told Staff, in substance, that they were dissatisfied with the Union. There is no evidence in the record that any of the employees of Respondent ever expressed dissatisfaction with the Union to Staff. The above matters in themselves and when considered in connection with the matters set forth below relating to Respondent's claimed reasonable doubt as to the Union's majority, fall short of establishing that the Union in fact did not represent a majority of Respondent's employees.

(3) The alleged reasonably based doubt of the Union's majority status

Respondent, through its chief executive officer, Berry, made a determination in mid-August 1974 that the Union did not represent a majority of its bar and culinary employees. Until October 24, 1974, when the Union was notified that Respondent doubted its majority status, Respondent continued to investigate the matter. However, Respondent's initial determination in that regard was made while it was still part of the multiemployer bargaining unit and still bound by the multiemployer contract. Respondent did not withdraw from the Association until August 30, 1974, 2 weeks later. Respondent did not notify the Union that it questioned the Union's majority status until October 24, 1974, almost 2 months after it withdrew from the Association. Respondent did not file a petition for an election until July 25, 1975, some 9 months after it refused to bargain with the Union.

The Board has long held that questions relating to an employer's reasonably based doubt as to a union's continued majority cannot be resolved by the application of any mechanical formulas and can only be answered "in the light of the totality of all circumstances involved in a particular case." *Celanese Corporation of America*, 95 NLRB 664 (1951). In the instant case Respondent has raised a number of matters on which it claims to have based a reasonable doubt as to the Union's majority. These matters must be considered in the context of the major disruption in the bargaining unit which occurred when Respondent withdrew from the Association, and in the context of the filing by Respondent of a petition for an election. Also to be considered, however, are the facts that Respondent made its determination that the Union did not represent the

majority of its bar and culinary workers before it withdrew from the multiemployer bargaining unit and the fact that Respondent did not see fit to file a petition for an election until some 9 months after it refused to bargain and some 11 months after it made the determination that the Union did not represent a majority.

Some of the matters raised by Respondent to establish a reasonably based doubt as to the Union's majority do not warrant prolonged discussion. Respondent's chief executive officer, Berry, knew that Nevada was a right-to-work State and that the contracts did not contain a union-security clause. Such matters do not indicate whether or not a union represents a majority of an employer's employees. Cf. *Wald Transfer & Storage Co., supra.* Berry's law partner told him that in a state court proceeding involving another employer the union representative had refused to disclose the actual membership in the union of the employees at the Lake. No implication can be derived from that fact that the Union did not represent a majority of Respondent's employees.

Other matters require more extended attention. Those include the trusteeship, the employee turnover, indications of employee dissatisfaction, and matters relating to union inactivity.

Berry had no knowledge of any election ever having been held among the employees. However, the presumption of majority can be based on either certification or voluntary recognition, and where an employer voluntarily recognizes a union it cannot use that fact as a basis for doubting the union's majority. Cf. *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Assn. of Pocatello, supra.*

Berry read in the newspapers that the Union was in trusteeship and he heard of financial difficulties of the Union. He also knew that in the summer of 1974 union

representatives were on the premises and that organizational activity was taking place. The fact that the Union was undergoing internal revisions does not indicate whether or not it continued to represent a majority of the Respondent's employees. A union may have financial difficulties whether or not it represents a majority, and organizational activity only indicates that a union desires more members than it has.

Berry knew that there was a very substantial turnover among the bar and culinary employees. High turnover is one circumstance, among others, that must be considered in determining whether an employer has a reasonably based doubt as to a union's majority status. *Peoples Gas System, Inc.*, 214 NLRB 930 (1974); *Convair Division of General Dynamics Corporation*, 169 NLRB 131 (1968); *Kentucky News, Incorporated*, 165 NLRB 777 (1967). However, high employee turnover in itself is insufficient to establish a reasonable doubt as to a union's majority, and the Board has repeatedly held that new employees will be presumed to support a union in the same ratio as those they may replace. *Strange and Lindsey Beverages, Inc., et al. d/b/a Pepsi-Cola-Dr. Pepper Bottling Co.* 219 NLRB 1200 (1975); *King Radio Corporation*, 208 NLRB 578 (1974), enfd. 510 F.2d 1154 (C.A. 10, 1975).

Berry knew that some of the employees were dissatisfied with the Union. Employee Pam, whose last name he could not remember, told him that she didn't want any part of the Union. Employee Connie, whose last name he could not remember, told him that she was not interested in being represented by the Union. Berry learned from Assistant General Manager Voss or General Manager Bay that employee Willsey had said that he did not want anything to do with the union people. Berry also learned from Bay or Voss that employee Roskin had said that he had dealings

with the Union in the east and that he was not too happy with them. Thus Berry had information that four named employees (two of whose last names could not be recalled) had expressed some form of disapproval of the Union. There were about 40 employees in the bar and culinary employees' unit in October 1974. The evidence adduced by Respondent falls far short of establishing that a majority of the employees in the bargaining unit expressed displeasure with the Union. The number that had expressed displeasure was insubstantial in relation to the overall employee complement in the unit and Respondent could not base a reasonable doubt of majority on such a limited number of remarks. Cf. *Strange and Lindsey Beverages, supra.*

Respondent's supervisors often talked among themselves about the status of the Union. Bar Manager Badertscher told Voss that he (Badertscher) felt that the people in the bar were not interested in being represented by the Union and that they were all happy with the conditions as they were. Voss reported that to Berry. Badertscher also told Bay that he (Badertscher) was of the opinion that the people that worked for him did not want the Union to represent them. Badertscher did not tell Bay the basis for that opinion. Bay reported the conversation to Berry. Voss told Bay that he (Voss) didn't think the Union had a majority at the club and Bay reported that to Berry. However, the subjective evaluations of supervisors cannot be used as a basis for reasonably doubting a union's majority. As the Board held in *Terrell Machine Company,* 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929 (1970):[26]

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26. In finding a violation in the *Terrell* case, the Board noted: "that the Respondent could have filed a petition for an election, or asked that the Union do so, in order to resolve its alleged doubt, but it took no such steps."

> To be of any significance, the evidence of dissatisfaction with a validly recognized incumbent Union must come from the employees themselves, not from the employer on their behalf.

The testimony of Union Business Agent Vickney and employee Labendz established that a union business agent visited the premises about twice a week at least until mid-1973. There is no evidence that the Union took an active role at Respondent's premises from mid-1973 until the early summer of 1974. During that period, Berry, Bay and Voss saw no union representatives on the premises and no grievances were filed. Beginning in July 1974, Union Business Representative Lawrence visited the premises about twice a week to enforce the contract and to receive complaints from employees. After October he visited the premises about twice a month. Berry knew that in the summer of 1974 several union organizers came onto the premises, and Voss knew that starting in July 1974 the Union was trying to contact some of the employees to join the Union. Though there is no evidence that union representatives were on the premises from mid-1973 until early 1974, the contract was in effect during that period. In addition, a sign was prominently displayed over the bar showing that Respondent was a union house.

Lack of activity by a union is one factor to be considered in evaluating whether a company has a reasonable doubt of the union's majority. *Taft Broadcasting*, 201 NLRB 801 (1973). In the instant case, a contract was in effect at all times until November 30, 1974, and there is no evidence that the Union abandoned its status as collective-bargaining agent of the employees. Berry testified that his reading of the contract in late June or early July 1974 led him to believe that Respondent had engaged in serious violations

of the contract without any protest from the Union. However, there is no evidence that the Union had knowledge of any contract violations or had any cause to believe that grievances should be filed. The relative inactivity of the Union between mid-1973 and early summer 1974 is not, in itself, sufficient to raise a reasonable doubt as to the Union's continued majority.

In *United Supermarkers, Inc.*, 214 NLRB 958 (1974), the Board found that an employer did not have a reasonable doubt based on objective facts as to the union's continued majority status. The Board held:

> A showing of such doubt requires more than an employer's mere assertion of it, and more than proof of an employer's subjective frame of mind. The assertion must be supported by objective considerations, that is, some substantial and reasonable grounds for believing the union has lost its majority status. [Footnotes omitted.]

After considering all of the factors set forth above, I conclude that Respondent did not have substantial and reasonable grounds for believing that the Union had lost its majority status. Respondent's assertion in that regard was based on subjective rather than objective considerations. In sum, I find that the presumption of continued majority has not been rebutted either by a showing that the Union, in fact, lost its majority status or by a showing that Respondent had a sufficient objective basis for reasonably doubting the Union's continued majority.[27] In addition, Respondent's refusal to bargain took place at a time when Respondent was maintaining an unlawful no-solicitation rule. Thus Respondent was engaging in conduct tending to encourage employee disaffection from the Union. Cf. *James*

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27. Cf. *N.L.R.B. v. Thompson, Inc.*, 525 F.2d 870 (C.A. 5, 1976).

W. Whitfield, d/b/a Cutten Supermarket, 220 NLRB 507 (1975). I find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, as set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union and by refusing bargain with the Union as the exclusive representative of its employees in the aforesaid appropriate unit, I shall recommend that Respondent be ordered to recognize and, upon request, to bargain in good faith with the Union as the exclusive representative of its employees in that unit.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the policies of the Act for the Board to assert jurisdiction.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining a no-access rule which prohibits solicitation on Respondent's premises by employees after their shifts have been completed, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. All employees employed by the Respondent in its bar and culinary operations at its Stateline, Nevada, operations, excluding all other employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

6. By withdrawing recognition from the Union and by refusing to bargain with the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the foregoing conduct, Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[28]

The Respondent, Barney's Club, Incorporated, Stateline, Nevada, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Maintaining any rule or regulation prohibiting its employees from soliciting on its premises after their shifts have been completed unless such prohibition is demonstrably necessary to maintain production, discipline, or security.

(b) Refusing to recognize and bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of its employees in the following bargaining unit:

> All employees employed by it in its bar and culinary operations at its Stateline, Nevada, operations, excluding all other employees, guards, and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive representative of its employees in the unit described above.

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28. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Post at its Stateline, Nevada, facility copies of the attached notice marked "Appendix."[29] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We hereby notify you that:

We will not prohibit our employees from soliciting on our premises after their shifts have been completed unless such a prohibition is demonstrably necessary to maintain production, discipline, or security.

We will not refuse to recognize and bargain in good faith with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive

29. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

representative of our employees in the following bargaining unit:

> All employees employed by us in our bar and culinary operations at our Stateline, Nevada, operations, excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL recognize and, upon request, bargain in good faith with said Union as the exclusive representative of our employees in that unit.

BARNEY'S CLUB,
INCORPORATED

Sparks Nugget, Inc., d/b/a John Ascuaga's Nugget and Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO and Sparks Nugget Employees' Council, Party in Interest. Cases 20-CA-9803, 20-CA-9853, 20-CA-9869, 20-CA-9897, 20-CA-9905, and 20-CA-9957.

June 17, 1977

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND MURPHY

On December 9, 1976, Administrative Law Judge Stanley Gilbert issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings[2] and conclusions[3]

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1. In support of its alternative defense that the Union did not, in fact, enjoy majority status on December 20, 1974, when recognition was withdrawn. Respondent asserts in its brief that it should have been permitted to adduce testimony from Business Representative Howard Lawrence regarding the existence of union business records demonstrating (if such could) that as of that date the Union represented a majority of the employees employed by Respondent. We find no merit in this contention, as it is well established that particularly where, as here, union membership was voluntary such records are irrelevant to a determination of whether a majority of the employees desired union representation. *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 491 (C.A. 2, 1975).

In further support of its alternative defense, Respondent asserts in its brief that it should have been permitted to adduce testimony from Field Examiner David Sargent of Region 20 of the National Labor Relations Board concerning his alleged review of the Union's business records. Respondent contended at the hearing that it also sought to question Field Examiner Sargent with respect to his alleged statement to Respondent's counsel in May 1975 that the unfair labor practice charge against Respondent would be dismissed. At the hearing, the Administrative Law Judge revoked the subpena directed to Field Examiner Sargent. We are satisfied that the testimony sought by Respondent fell within the "limited evidentiary privilege which protects the informal investigatorial and trial-preparatory processes of regulatory agencies such as the NLRB," *Stephens Produce Co., Inc. v. N.L.R.B.*, 515 F.2d 1373, 1376 (C.A. 8, 1975), and that Respondent has shown no substantial reason to disregard it. Indeed, union business records are wholly irrelevant to the issue raised by Respondent's defense, *Retired Persons, supra,* and any remark Board Agent Sargent may have made to Respondents' counsel concerning the anticipated dismissal of the instant unfair labor practice charge is irrelevant to any issue in this proceeding because the General Counsel did, in fact, issue a complaint. Accordingly, we conclude that the Administrative Law Judge properly revoked the subpena of Field Examiner Sargent.

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2. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established

of the Administrative Law Judge,[4] except as discussed below, and to adopt his recommended Order as modified herein.[5]

We agree with the Administrative Law Judge, for the reasons stated by him, that Respondent variously violated Section 8(a)(1), (3), and (5) as fully described in the attached Decision.

However, for the reasons set forth below, we disagree with the Administrative Law Judge's conclusion that the Sparks Nugget Employees' Council (herein the Council) is a labor organization within the meaning of Section 2(5) of the Act, and that Respondent's assistance to and domination of said Council violated Section 8(a)(2) of the Act.

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policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

3. For the reasons set forth in *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget*, 227 NLRB 357 (1976), we agree with the Administrative Law Judge's conclusion that the Union's presumption of majority status based on its recognition as the bargaining representative for Respondent's employees as part of a multi-employer unit survived Respondent's timely withdrawal from that unit.

Also for the reasons set forth in *Nevada Lodge*, 227 NLRB 368 (1976), we disagree with the Respondent's contention that the Board should not assert its clearly established legal jurisdiction in this case.

4. Respondent's request for oral argument is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

5. In par. 1(h) of his recommended Order, the Administrative Law Judge uses the narrow cease-and-desist language "in any like or related manner," rather than the broad injunctive language "in any other manner," which the Board traditionally provides in cases involving serious 8(a)(3) discriminatory conduct. See *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4, 1941). Accordingly, we shall modify the recommended Order to require the Respondent to cease and desist from in any other manner infringing on employee rights. The notice to employees will also be modified.

In mid-February 1975, Respondent distributed a memo dated February 13, 1975, addressed "To: All Nugget Employees" which stated: "Effective February 16, 1975, an impartial Employees Council will be established at the Nugget for employees who are unable to resolve problems with their supervisors." The memo outlined the grievance procedure which culminated in final resolution of grievances by the Council, and provided a ballot which employees were instructed to use in selecting their representatives for the Council. The Council was implemented on February 17, 1975, when the employees voted for their representatives.

As set forth in the memo, and in the "Nugget Employees Council Rules of Procedure,"[6] the employees in each department are to vote anually for an employee representative on the Employees' Council. When it meets to resolve grievances, the Council is composed of Respondent's director of employee relations, who sits as chairman, the employee member elected from the grievant's department, and a third member selected by the first two. This member must come from the management of a department other than that of the grievant.

The first two stages of the new grievance procedure involve discussions between the grievant and his or her supervisor and department head. If the employee is not satisfied with the resolution at either stage and makes a timely request, the Employees' Council is convened by Respondent's personnel department.

The Council meets in a meeting room in the Nugget complex (but outside the offices of management) and receives

6. These rules were not formulated by the Council, but appear to have been dictated by Jerry Higgins, Respondent's director of public and employee relations.

testimony and/or exhibits, first from the employee and then from the employee's immediate supervisor. The Council then makes a decision[7] which is binding on all involved. *Ex parte* contacts with members of the Council are forbidden and will disqualify from the Council any member who engages in such contacts.

The Council is convened on an *ad hoc* basis to deal with specific employee grievances. Nothing in the memo announcing its formation, in the "Rules and Procedure," or in its functioning thus far indicates that the Council performs any but an adjudicatory function regarding employee grievances. Nor is there evidence that the Council has ever initiated grievances, recommended for management's consideration changes in terms and conditions of employment, or acted in any manner as an advocate of employee interests.

Section 2(5) of the Act defines a "labor organization" as including any "employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Although the Supreme Court has held that the term "dealing with" encompasses more than the term collective bargaining,[8] we find, as set forth below, that the Employees' Council herein does not "deal with" the Employer within the scope of the statutory definition.

In *Cabot Carbon*, and in the other cases cited by the Administrative Law Judge in support of his finding that

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7. There is no testimony as to whether the Council's deliberations are in private or whether the determination of the grievance is reached by secret ballot. Such evidence, however, is not crucial to our finding here.

8. *N.L.R.B. v. Cabot Carbon Company*, 360 U.S. 203, 211 (1959).

the Employees' Council is a labor organization, the organizations in question "dealt with" the respective employers in some sense as the employees' advocates.[9] Here, however, as not above, the Employees' Council performs a pure adjudicatory function and does not interact with management for any purpose or in any manner other than to render a final decision on the grievance. Therefore, it cannot be said that the Employees' Council herein "deals with" management. Rather, it appears to perform a function for management; in resolving employee grievances. Accordingly, we conclude that, inasmuch as the Employees' Council is not a labor organization, Respondent's conduct of instigating, dominating, and assisting said Council was not unlawful under Section 8(a)(2) of the Act.

Nonetheless, as set forth below, we find the Respondent, by unilaterally establishing said Council for the purpose of adjudicating employee grievances thereby violated Section 8(a)(5) and (1) of the Act.

It is clear from the record that Respondent instituted and utilized this grievance procedure without consulting

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9. For example, in *Cabot Carbon, supra,* the "Employee Committee" discussed with management, *inter alia,* such topics as safety, efficiency and production, and grievances. In handling grievances, the Employee Committee gathered and evaluated pertinent information; if the Committee considered the grievance just, it presented the grievance to the designated management representative. The Committee could also appeal any grievance which it considered to have been unfairly resolved.

Similarly, the "Company Committee" in *Money Oldsmobile Company,* 201 NLRB 155, 156-157, 167-168 (1973), was set up to discuss with management current problems, suggestions for improvement, complaints, and grievances, particularly with regard to working conditions. See also *North American Rockwell Corporation,* 191 NLRB 833, 837-838 (1971), in which the employee grievance committee in meetings with management discussed a "broad range of subject matter," including "working hours, job assignments, wage inequities, merit raises, bonuses, seniority, retirement fund, equipment and conditions of work, and generally the whole gamut of grievances."

the Union. As noted above, at the time of the Respondent's refusal to bargain, the Union herein continued to enjoy a rebuttal presumption that its majority status continued. We conclude, for the reasons set forth by the Administrative Law Judge, that Respondent has not rebutted that presumption. Accordingly, we find that by unilaterally instituting a new grievance procedure including the Employees' Council, while Respondent was under a continuing obligation to bargain collectively with the Union, Respondent violated Section 8(a)(5) and (1) of the Act.[10]

AMENDED CONCLUSIONS OF LAW

We modify the Administrative Law Judge's Conclusions of Law as follows:

1. Delete paragraph 6 and renumber the subsequent paragraphs accordingly.

2. Insert the following as paragraph 8:

"8. By unilaterally instigating, establishing, maintaining, or utilizing a new and different grievance procedure, including the establishing of the Sparks Nugget Employees' Council, for its employees in the above-described bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act."

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10. See, e.g., *Eastern Washington Distributing Company, Inc.*, 216 NLRB 1149, 1154-55 (1975).

Although the Respondent's unilateral institution of its new grievance procedure, of which the Sparks Nugget Employees' Council was an integral part, was not specifically alleged as a separate violation of Sec. 8(a)(5), it was alleged as part of the general 8(a)(5) allegation. Furthermore, the instigation, establishment, assistance, and domination of the Council by Respondent, were alleged as a violation of Sec. 8(a)(2) and were fully litigated in that context. Accordingly, Respondent cannot claim that it is prejudiced by our finding that its conduct was unlawful under Sec. 8(a)(5). It is well settled that the Board may find violations which were not alleged, if the issues and facts were fully litigated. *Lorenz & Sons, Inc.*, 217 NLRB 471 (1975).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Sparks Nugget, Inc., d/b/a John Ascuaga's Nugget, Sparks, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(d):

"(d) Unilaterally instigating, establishing, maintaining, or utilizing the Sparks Nugget Employees' Council and the grievance procedure of which said Council is a part."

2. Substitute the following for paragraph 1(h):

"(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act."

3. Substitute the attached notice for that of the Administrative Law Judge.

CHAIRMAN FANNING, dissenting in part:

I cannot join my colleagues in reversing the 8(a)(2) violation found by the Administrative Law Judge with respect to the Sparks Nugget Employees' Council. There can be no question that the Respondent was the moving force in instigating, implementing, and dominating—the latter partly by its 2-to-1 ratio of committee participation—the new grievance plan which was to supplant the grievance provisions of the contract about to expire. Apparently because the committee was designed to "deal with" individual employees' grievances, my colleagues find it an adjudicatory body rather than a labor organization within the meaning of Section 2(5) of the Act. They concede that the Supreme Court has found that the said definition of a labor organization as "dealing with" employers means more than collective bargaining, but overlook the disjunctive

phrasing of the statutory definition. On its face it patently provides that a committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances is a labor organization. Dealing with an employer concerning one or more of the matters enumerated in the statute suffices. See *Thompson Ramo Wooldridge, Inc. (Dage Television Division)*, 132 NLRB 993, 994 (1961). Evidence of policy suggestions to an employer having been made by a committee, or of possible expansion of the committee role beyond dealing with grievances, is superfluous. But of course the adjudication of individual grievances in itself tends to encompass other 2(5) alternative purposes such as wages, or rates of pay, or hours, etc.[11]

With respect to the remedy for this 8(a)(2) violation, I am, however, not in agreement with the Administrative Law Judge that it is enough to order that Respondent cease and desist from again initiating such an organization even though, as the Administrative Law Judge provided, his remedy also includes "from maintaining and dealing" with it. In my view an affirmative order to disestablish and withdraw recognition is appropriate.[12] My colleagues are con-

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11. See *FTS Corp. (Division of Hitco)*, 184 NLRB 787, 794-795 (1970), where the Administrative Law Judge noted the view taken by one of the circuit courts of appeal (*N.L.R.B. v. Associated Machines, Inc.*, 219 F.2d 433 (C.A. 6, 1955)), that individual grievances were not within the definition of Sec. 2(5) of the Act, a result with which he did not agree (his position adopted by the Board panel). I would note that the Sixth Circuit's decision in 1955 took the position that the term "grievances" is not associated with the major objectives of labor organizations, whereas the Supreme Court 4 years later in its *Cabot Carbon* opinion interpreted "dealing with," as used in Sec. 2(5), as of broader import than collective bargaining. The *Associated Machines* decision seems fundamentally inconsistent.

12. See *STR, Inc., d/b/a Sound Technology Research*, 221 NLRB 496 (1975); *Rupp Industries, Inc.*, 217 NLRB 385 (1975).

tent to dismiss the 8(a)(2) allegation with respect to this activity and find instead that this unilateral establishment of the committee is an 8(a)(5) violation. It can be so found, though not so alleged. However, the failure to treat instigation and domination of the committee as the obvious 8(a)(2) violation it is can only weaken the general bargaining order for withdrawing recognition from the Union, with which we all agree. My colleagues apparently wish simply to say that Respondent must bargain about changes in the contract grievance procedure because of its unilateral action, in connection with bargaining generally concerning a new contract. Thus they fail to clear the air for meaningful bargaining on a new contract. By failing to disestablish and to order withdrawal of recognition of the competing "labor organization" created by Respondent's efforts to oust the incumbent Union, they ignore the unsettling effect of a committee organization, even if dormant, a situation that will tend to dilute or divert the employees' support for the Union that is attempting to secure a new contract in their behalf.

I agree with my colleagues' and the Administrative Law Judge's finding of an 8(a)(5) violation based upon the unilateral implementation of a new insurance policy, which occurred well before the February 15 contract termination date and in apparent derogation of Respondent's commitment under the expiring contract to keep the insurance benefits in force during negotiations, until May 15, 1975, if necessary. I would, however, expand the remedy. That the Union, which had for several months been busy negotiating a new multiemployer contract in other parts of the State, waited until February 13 to request information from Respondent concerning the insurance issue it had precipitated is in my view no reason to penalize the unit employees who

may have been affected. The Administrative Law Judge limited the affirmative relief to furnishing the Union a copy of the policy. Instead, I would direct the Respondent to furnish the Union, upon request, with all information necessary to determine whether the new policy unilaterally effectuated should be continued in force, and give the Union the option of requesting that Respondent rescind the said insurance plan and restore the earlier plan pending bargaining with the Union about changed provisions. In addition, I would direct Respondent to make whole the employees, if any, who may have suffered as a result of the unilaterally substituted insurance plan.

Finally, inasmuch as maintaining a no-solicitation rule that is invalid on its face is at issue here, I would not limit the violation found to the prohibition of after-shift solicitation. I would also prohibit maintenance of the first "sentence" of the rule covering solicitation during "working time." See Member Jenkins' and my dissent in *Essex International, Inc.*, 211 NLRB 749, 753 (1974), wherein we said that "the phrase 'working time' standing alone does not clearly and unambiguously convey to employees the valid intent and purpose of restricting their organizational activities only during the time they are required to be working at their stations."

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We will not maintain any rule or regulation prohibiting our employees from soliciting on our premises after their shifts have been completed.

WE WILL NOT unlawfully interrogate employees concerning their relationship to and activities upon behalf of Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, or any other labor organization.

WE WILL NOT issue warning notices to employees in order to deter them from supporting or engaging in activities upon behalf of said Union, or any other labor organization.

WE WILL NOT instigate, establish, maintain, or utilize Sparks Nugget Employees' Council and the grievance procedure of which said Council is a part.

WE WILL NOT unilaterally institute any alterations, modifications, or changes in the terms and conditions of employment which are mandatory subjects of bargaining with the aforesaid Union.

WE WILL NOT refuse to furnish to said Union a copy of our current insurance program covering employees represented by said Union.

WE WILL NOT refuse to recognize and bargain with said Union as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

> All employees employed in our bar and culinary operations at our Sparks, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, upon request, bargain collectively with Hotel - Motel - Restaurant Employees & Bartenders

Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described above, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL furnish said Union, upon request, a copy of our current insurance policy covering our employees in the above-described bargaining unit.

WE WILL remove from the personnel file of John Dyer the warning notice we issued to him on or about January 20, 1975.

SPARKS NUGGET, INC.,
d/b/a JOHN ASCUAGA'S
NUGGET

DECISION

STATEMENT OF THE CASE

STANLEY GILBERT, Administrative Law Judge: Based on charges, as amended, filed in the above cases by Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, hereinafter referred to as the Union, the amended complaint[1] herein was issued on September 22, 1975. The charges in said above cases were filed as follows: (1) in Case 20-CA-9803 on December 16, 1974, as amended

1. On August 26, 1975, a consolidated complaint was issued in the above cases naming Spark's Nugget, Inc., d/b/a John Ascuaga's Nugget and other employers as Respondents. On September 18, 1975, an order was issued severing the other employers from the instant case and pursuant thereto the amended consolidated complaint herein was issued.

on December 18, 26, and 31, 1974, January 3 and 6, May 9, and June 2, 1975; (2) in Case 20-CA-9853 on January 13, 1975, as amended on June 17, 1975; (3) in Case 20-CA-9869 on January 16, 1975, as amended on June 17, 1975; (4) in Case 20-CA-9897 on January 23, 1975, as amended on June 17, 1975; (5) in Case 20-CA-9905 on January 27, 1975, as amended on May 7 and June 25, 1975; and (6) in Case 20-CA-9957 on February 10, 1975, as amended on May 2 and June 2, 1975.

Said amended complaint herein, which was amended during the course of the hearing, alleges that Sparks Nugget, Inc., d/b/a John Ascuaga's Nugget, hereinafter referred to as Respondent or Company, violated Section 8(a)(1), (2), (3), and (5) of the Act. Respondent, by its answer as amended during the course of the hearing, denies that it committed the unfair labor practices alleged as well as other allegations.[2]

Pursuant to notice a hearing was held in Reno, Nevada, on August 3, 4, and 5, 1976, before me. Appearances were entered on behalf of the General Counsel, Charging Party, and Respondent and briefs were timely filed on behalf of said parties on September 23, 1976.

Based upon the entire record[3] in this proceeding and my

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2. Among the allegations denied is that Respondent is an employer "within the meaning of Section 2(2), (6), and (7) of the Act." The argument in support of this denial is essentially that the Board's assertion of jurisdiction over employers in the gaming industry in Nevada is "arbitrary and capricious" in view of its refusal to assert jurisdiction over employers in the horseracing industry. Since I am bound by the Board's decisions to assert jurisdiction over employers in the gaming industry, I find no merit in this contention of Respondent.

3. It should be noted at this point that at the hearing General Counsel withdrew the allegation in par. VII(e) of the complaint and that the allegations in par. VII(a), (b), (f), and (g) were dismissed on the grounds that no evidence was introduced in the record to support said allegations.

observations of the witnesses as they testified, I make the following:

Findings of Fact

I. THE BUSINESS OF THE RESPONDENT

As is admitted by Respondent, it is a corporation engaged in the operation of a hotel, restaurant, bar, and casino in Sparks, Nevada; and, during the past calendar year, in the course and conduct of its business operations, it received gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $10,000 which originated outside the State of Nevada.

Respondent is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.[4]

II. THE LABOR ORGANIZATIONS INVOLVED

Although Respondent, by its answer, denies the allegation in paragraph IV of the complaint as follows: "The Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act," it entered into the following stipulation: that the Union "exists for representing employees for the purposes of wages, hours and working conditions." Respondent did not, in its brief, offer any argument in support of its denial of the aforesaid allegation. It appears from the record that for a considerable period of time the Union represented employees in a multiemployer bargaining unit (which included employees of Respondent) for the purpose of collective bargaining. Consequently, it is found that the allegation in paragraph IV of the complaint has been sustained.

For the reasons set forth hereinbelow, it is found that the Sparks Nugget Employees' Council is, and at all times ma-

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4. See fn. 2, *supra*.

terial herein since February 16, 1975, has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background Information and Undisputed Facts*

The Reno Employers Council, herein referred to as REC, is a Nevada corporation with its office located in Reno, Nevada. At all times material herein, as well as prior thereto, REC has been a voluntary association of employers engaged in, *inter alia,* the casino and restaurant industry. The purpose of REC is to represent its member-employers in collective bargaining, negotiating, and administering collective-bargaining agreements with various labor organizations, including the Union.

From 1956 through 1975, REC, on behalf of its member-employers in the Reno area, and the Union, have been parties to a series of multiemployer collective-bargaining agreements in a multiemployer collective-bargaining unit. Respondent joined REC in 1960 and became bound by the Union's 1961-63 contract with REC which was entered into on or about August 16, 1961. Respondent continued its membership in REC until December 9, 1974, at which time it timely withdrew from the multiemployer group.

In anticipation of the expiration of the 1972-75 collective-bargaining agreement, Al Bramlet, the International trustee of the Union, wrote to Respondent and REC on November 15, 1974, requesting that they contact the Union regarding negotiations and proposed modifications. On December 9, 1974, Respondent, by its representative, John Ascuaga, advised REC of its withdrawal from that multi-employer association. Subsequently, on December 12, 1974, Ascuaga advised the Union of Respondent's intent to terminate the collective-bargaining agreement upon its expiration. Addi-

tionally, on December 12, 1974, Clinton G. Knoll, general manager of REC, advised the Union by letter that the current collective-bargaining agreement would be terminated on February 15, 1975, and the REC was no longer authorized to represent certain signatories to the agreement (including Respondent) for collective-bargaining purposes.

On December 13, 1974, the Union's attorney, Philip P. Bowe, wrote to Respondent and REC, referring to Bramlet's November 15, 1974, letters, requesting that they contact Bramlet to commence contract negotiations. On December 17, 1974, Bowe, in a letter addressed to Knoll with a copy addressed to Respondent, again requested that Respondent commence negotiations or face possible NLRB charges. On December 20, 1974, Respondent's attorney, Nathan Berke, by letter addressed to the Union expressed Respondent's ". . . genuine doubt that [the Union] continues to represent an uncoerced majority of [its] employees in an appropriate unit." It is undisputed that Respondent has refused and continues to refuse to bargain collectively with and has withdrawn recognition from the Union as the exclusive bargaining representative of employees employed by Respondent in its bar and culinary operations at its Sparks, Nevada, casino.

B. *The Bargaining Unit Involved*

It is alleged in paragraph XII of the complaint as follows:

> All employees employed by Respondent in its bar and culinary operations at its Sparks Nevada place of business, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Although Respondent, by its answer, denies said allegation, it failed to introduce any evidence or assert any argu-

ment in support of said denial. Since historically the employees of Respondent in the above-described bargaining unit were part of the *multiemployer bargaining unit* and were severed from said multiemployer bargaining unit by the above-mentioned timely withdrawal of Respondent from REC, it would follow that Respondent's employees in the above-described *individual unit* constitute an appropriate bargaining unit within the meaning of Section 9(b) of the Act. It is noted that during the time material herein there were approximately 700 employees in said bargaining unit.

C. *The Issues*

The General Counsel, in his brief, contends that Respondent violated the Act as follows:

1. That it violated Section 8(a)(1) of the Act by the following conduct:

(a) By unlawfully interpreting an otherwise valid no-solicitation rule.

(b) By unlawfully interrogating and threatening employee Gail Launius on October 17, 1974.

(c) By unlawfully reprimanding employee Richard Davis on the same date.

(d) By maintaining a no-solicitation rule which is invalid on its face.

2. That it violated Section 8(a)(3) and (1) of the Act by unlawfully issuing a warning notice to employee John Dyer on or about January 20, 1975.

3. That it violated Section 8(a)(2) of the Act by initiating, forming, sponsoring, and promoting the Sparks Nugget Employees' Council on February 13, 1975, and by assisting, dominating, contributing to the support of, and interfering with the administration of said Council.

4. That it violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a new and different insurance program on December 1, 1974, and by subsequently refusing to furnish the Union with information with respect to the new program.

5. That it also violated Section 8(a)(5) and (1) of the Act by withdrawing its recognition of the Union as the exclusive bargaining representative of the employees in the above-described bargaining unit (which was found hereinabove to be an appropriate unit) and refusing to bargain with the Union with respect to said unit.

D. *Resolution of the 8(a)(1) and (3) Issues*

Since at least 1968, and within the time material herein, Respondent maintained a set of rules as follows:

NO SOLICITATION RULE

Based upon long established rules, your attention is called to the following:

Solicitation of any type by employees during working time is prohibited.

Solicitation on company premises by employees after employees shift has been completed is prohibited.

Distribution of literature of any type or description by employees during working time is prohibited.

Distribution of literature of any type or description in working areas is prohibited.

Violation of any of the above rules will result in immediate disciplinary action, including discharge.

The above rules were posted on the main bulletin board by the payroll timekeeping office and were included in departmental handbooks which employees "normally" received upon being hired. In addition, a sign stating "no soliciting" was posted at each entrance to the premises.

It appears, and there is no dispute, that the rule against solicitation "during working time" is valid on its face. Although there is evidence that Respondent referred to this rule as applying to "company time," there is no probative evidence to support a finding that employees were led to believe that the rule applied to anything beyond "working time," and, therefore, it is concluded that the General Counsel has failed to prove his contention that this rule was unlawfully interpreted.

There is also an issue as to the validity of the rule prohibiting solicitation on company premises after the employee's shift has been completed which is considered hereinbelow.

With respect to the incident involving Launius on October 17, 1974, there was testimony from three witnesses, Thomas (Jerry) Higgins, Richard Davis, and Eugene Berry. Launius was not called as a witness.

Higgins, Respondent's director of public and employee relations and an admitted supervisor, was called as a witness by General Counsel and credibly testified that he and Berry, assistant restaurant director, interviewed Launius, a waitress, in the breakroom on October 17, 1974. Higgins further credibly testified that he had received a report from his supervisor that Launius had been making personal calls on company time which is against company policy; that the two of them met with her to "counsel her in that regard"; that counseling consists of giving a notice which *could be in the nature of a reprimand;* that he hold her of the report he had received about making telephone calls; that she admitted doing so and signed the notice; that thereafter he told her he heard she was employed by the Union at a salary of $100 a month "to spy or inform on the Nugget to the union" and that she was "soliciting" on behalf of the Union; that he asked her if she had been doing it on her

own time or on "company time"; that she said "mostly on her own time"; and that he warned her that any further confirmed reports of her soliciting in violation of the "Company's rule" could result in her termination.

Davis testified that he heard part of the conversation during the interview, but his testimony neither adds to, nor contradicts anything of significance in, the testimony of Higgins. Berry testified to the effect that Davis was not in the breakroom at the time of the interview with Launius. Berry's testimony was not convincing inasmuch as he was facing the wall during the interview and was not able to identify any of the five or six employees who he testified were also present. In any event, since I find Davis' testimony to be of no significance, even assuming Berry's testimony were to be credited, it would not affect any of the findings with respect to the interview.

Davis further testified to another incident on October 17, 1974, as follows:

> I was working at the time in the Pancake Parlor. Mr. Keister, one of the two chefs, told me that I was wanted in the chef's office. I went into the chef's office and there was Mr. Lesquereux and Mr. Higgins. Mr. Higgins informed me that I had been seen violating company policy to soliciting. I said that I had not. He showed me a notice that had something to do with soliciting on it, saying that people were not to solicit in the Nugget. I told him at that time that I understood what my rights were as far as solicitation was concerned, that I could not solicit, that I could not speak to people about the union during working hours. But that I was able to talk to people about the union and union activities not soliciting, but to speak to them about union activities during off hours and during my own time on breaks. I said this was the only time I had

spoken to people about it. He subsequently tore up the counselling notice.[5]

With respect to the rule prohibiting solicitation on the company premises after the end of an employee's shift, it is, on its face, violative of Section 8(a)(1) of the Act. *East Bay Newspapers, Inc., d/b/a Contra Costa Times,* 225 NLRB 1148 (1976). Respondent argues that, although employees are welcomed in the public areas after their shift, they are treated as customers and customers are not permitted to engage in solicitation as evidenced by signs at entrances to the premises stating "No Soliciting." It is inferred that said signs are intended to apply to vendors, such as sellers of flowers, attempting to ply their trade among customers, and that it cannot reasonably be construed to restrict customers from engaging in the many forms of solicitation they are wont to do, such as soliciting business which is common among customers in public places such as restaurants and bars. Respondent has failed to show any overriding reason for prohibiting an employee, as a customer, soliciting another employee, also as a customer, to support the Union. Consequently, it is concluded that said rule is not "necessary for protection, safety, or discipline," and is violative of Section 8(a)(1) of the Act. *East Bay Newspapers, Inc., supra.*

With respect to the conduct involving employee John Dyer, he credibly testified to a conversation he had with Higgins on January 20, 1975, as follows:

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5. Although according to the above uncontradicted testimony it appears that Higgins stated an unlawfully overbroad interpretation of the Company's rules, I am of the opinion that his version of what Higgins stated was inadvertently imprecise, as well as his own version of the rules. In any event, General Counsel represented that his testimony related to par. VII(d) of the complaint (unlawful reprimand) and the incident was not fully litigated. Therefore, the above-quoted testimony is only considered with regard to said paragraph of the complaint.

> Oh. Mr. MacIntire called me into the office and said Mr. Higgins wanted to talk to me. And Mr. Higgins told me that he had more than two reports that I had been soliciting for the union. And it was his duty to counsel me on it. He showed me a slip of paper and had me to read it. And he said this was the rules and regulations against soliciting for the Nugget, put out by the Nugget.

It appears that the rules he was shown are those set forth hereinabove, including the rule which has been found to be unlawful and that said rule was one of two specifically referred to by Higgins.

Dyer's credited testimony continues as follows:

> He had a pad of counselling notices in his hand, or more than one sheet, anyway. And he asked me to read it and if I had any comments to write them down on it and told me he—he asked me to sign it. And he said signing it didn't mean that I was admitting that I did it. It was only that I received the counselling slip.
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> I told him that I hadn't solicited for union membership on Company time or otherwise.
>
> Q. And what was his response to that, if any?
>
> A. Well, he told me that he had more than two reports of this. And that in view of that that he was required to give me a counselling slip.

It is noted that the "violation" stated on the notice is as follows: "soliciting for union membership on company time." Respondent contends that there was a discrepancy between his testimony and a statement contained in a "Grievance-Complaint Form" which he signed. Said statement is as follows: "I told Higgins that on my break or before and after work I do talk Union 'pro and con' . . . ." This, to my mind, does not constitute a contradiction of his

testimony that he told Higgins that he *had not solicited* for union membership. In any event, Dyer's testimony was uncontradicted and is credited.

Following is a resolution of the issues with respect to the incidents involving Launius, Davis, and Dyer.

With respect to the interrogation of Launius, Respondent contends, in effect, that the interrogation as to her being paid by the Union was to ascertain whether she was a business agent of the Union and subject to the provision of the contract which required notification to management of "her presence." I find, however, that this purpose was an afterthought, since no reference was made to the contract provision at that time. Moreover, the accusation that she was being paid "to spy or inform on the Nugget," is not consistent with the duties of a union representative under said provision of the contract and furthermore indicated animosity toward her. As to questioning her about solicitation in violation of the Company's rule, there is no showing that Respondent had any reports she was soliciting during working hours. Considering the evidence of animosity and threat of discharge if there were any further "confirmed reports" of her violating the Company's "no soliciting policy," I am of the opinion that, as contended by General Counsel, Launius was unlawfully interrogated within the meaning of Section 8(a)(1) of the Act (as alleged in para. VII(c) of the complaint). *Foodmaker, Inc., d/b/a Jack-in-the-Box,* 199 NLRB 109, 110-111, 114 (1972).

As to the incident involving Davis, General Counsel contends that he was unlawfully threatened by Higgins, as alleged in paragraph VII(d) of the complaint. It appears from Davis' testimony that Higgins was investigating reports that he had violated the Company's rule against soliciting, that his denial of doing so was believed, and that the

counseling notice charging him with the violation which had been previously prepared was torn up by Higgins. I do not believe, in the circumstances, that Higgins' conduct constituted an unlawful reprimand within the meaning of Section 8(a)(1) of the Act, as alleged in the complaint.

As to the conduct with respect to Dyer, instead of tearing up the notice as he did in the case of Davis upon Davis' denial, Higgins insisted on giving Dyer the notice despite Dyer's denial. Moreover, he pointed out to Dyer the invalid section of the rule. There is no showing that Dyer did violate the lawful section of the rule or any probative evidence that Higgins had a reasonable basis for believing that he did. It is inferred that by having Dyer sign the notice it would be placed in his personnel file and it is reasonable to assume that its presence in his file might very well affect his job security. In the circumstances, I am of the opinion that the notice was issued because Respondent suspected Dyer of union activity and issued the notice to deter him from continuing such activity. Consequently, I am of the opinion that by Higgins' conduct with respect to Dyer Respondent violated Section 8(a)(3) and (1) of the Act, as alleged in paragraph VIII of the complaint.

E. *The Sparks Nugget Employees' Council*

It is undisputed that on or about February 13, 1975, Respondent announced the formation of an organization called the "Sparks Nugget Employees' Council"; that the idea for the Council originated with Respondent; that it was created by an election of employee representatives directed and conducted by the Respondent; that its "chairman" was one of Respondent's supervisors; and that its purpose was defined by Respondent to handle employee grievances.

Respondent asserts that the Employees' Council implemented on February 17, 1975, exists for the purpose of expanding the "open door" policy at the Nugget; that it convenes when an employee is unable to solve a problem with his supervisor or department head; that it is composed of Higgins, the employee representative (elected by the employees of each department) from the complaining employee's department, and a third member chosen by the employee representative and Higgins;[6] and that it is not a continuing body, but operates similarly to an arbitration panel or a tribunal selected by the employee through his department representative and the representative of the employer.

Respondent contends, in effect, that the Council does not "negotiate" with respect to any terms or conditions of employment, but rather is a form of "arbitration panel," and therefore is not a labor organization within the meaning of the Act.

Section 2(5) of the Act defines a "labor organization" as follows:

> Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The Council meets the criteria of a labor organization within the meaning of Section 2(5), in that employees participate through the election of representatives to sit on the Council, and the Council does address itself to the solution of employee grievances with their supervisors. Presumably

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6. The third member was required to be chosen from a list of "management representatives."

such grievances cover the various aspects of the employees' relationship with their employer, such as tenure or terms and conditions of employment. The fact that the Council did not "negotiate" with Respendent but was limited solely to the processing of grievances and did not engage in any other type of collective bargaining with Respondent does not exempt it from being a labor organization within the meaning of Section 2(5) of the Act. *N.L.R.B. v. Cabot Carbon Company and Cabot Shops, Inc.*, 360 U.S. 203, 205-218 (1959) (wherein the employees' committee was found to be a labor organization within the meaning of the Act and the Court said that the language of Section 2(5), "dealing with" is not synonymous with "bargaining with"). See also *North American Rockwell Corporation*, 191 NLRB 833, 837-838 (1971) (employee grievance committee which was limited to discussion of "complaints, gripes, and questions"). *Money Oldsmobile Company*, 201 NLRB 155, 167-168 (1973), and cases cited therein (committee was created and defined by the employer). Thus, the Sparks Nugget Employees' Council, as found hereinabove, was and is a labor organization within the meaning of Section 2(5) of the Act.

By a document distributed by management entitled "Nugget Employees' Council-Rules of Procedure," Respondent instigated the Council and dictated in detail how it was to be formed and how it was to operate. It left no option to the employees not to participate in the formation and operation of the Council except that the individual employee had the option of determining whether to submit his grievance to the Council. The time spent in its operation, the facilities for it, and all administrative expenses were assumed by Respondent. In the circumstances, I conclude that Respondent violated Section 8(a)(2) of the Act by instigating, assisting, and dominating the Council.

F. *The New Insurance Program*

It is undisputed that Respondent on December 1, 1974, instituted a new insurance program covering the bar and culinary employees, who had, prior to that time, been covered by an insurance program included in Respondent's collective-bargaining agreement with the Union, which agreement, by its terms, was not due to terminate until the end of February 15, 1975. Also, it is admitted by Respondent that at no time prior to the time it was put into effect did Respondent advise, consult with, or notify the Union of the new program covering the bar and culinary unit. In addition, it is also undisputed that subsequent to the introduction of the program, Respondent refused to provide information to the Union regarding the provisions of the program which was requested by the Union in a letter dated February 13, 1975.

Respondent justified its admitted unilateral action in instituting the insurance program by asserting that it had, in the past, instituted other benefits covering employees represented by the Union, without objection. Both Glen Carr, Respondent's general manager, and Higgins testified that they were advised by Clinton Knoll, general manager of the REC, and their attorney, Nathan Berke, that the collective-bargaining contract allowed for such alterations. Both Carr and Berke (in his letter to the Union of February 20, 1975, refusing Respondent's request for information regarding the new policy) referred to article XVIII of the 1972-1975 collective-bargaining agreement as justification for instituting the program without consulting the Union and for refusing to provide the necessary information. An examination of article XVIII of the 1972-1975 collective-bargaining agreement discloses no basis for Respondent's unilateral institution of the insurance program covering the

bar and culinary employees or for refusing to supply information to the Union regarding said program.

Carr testified that he relied on all three sections of article XVIII as the basis for unilaterally instituting the program. An examination of section 1 of this article (which sets out the benefits under the insurance plan) clearly lends no authority for making the unilateral change. Section 2 which provides:

> In the event that the parties are unable to reach agreement upon the terms of a new Agreement by February 15, 1975, the Employer agrees to continue to provide such benefits during the period of negotiations (so long as the Union refrains from engaging in a strike), but no later than May 15, 1975. . . .

furnishes no basis for unilaterally instituting the new plan. Section 3 provides:

> Where an Employer now has an acceptable plan equal to or in excess of the condition stated herein, said plan may continue in full force and effect in lieu of the hereinabove stated benefits, and, then in that event, the wage rates for the classifications shall be five cents (5¢) per hour in excess of those listed in the wage scale herein.

Section 3 clearly acknowledges that an employer with a plan *already in effect,* and *acceptable,* may maintain such plan rather than the plan provided for in the collective-bargaining agreement, and is only required to adjust the rates to the wage scales included in the agreement. It is apparent that such provision was made to accommodate employers who had an insurance plan in effect *at the time they became covered by the collective agreement,* and the existing plan would only be allowed to remain in effect if it was found to be acceptable; i.e., the coverage was com-

parable to or in excess of that provided in the contract. The facts herein do not fit within the meaning of this section of the agreement.[7] Consequently, it is found that there is no basis in article XVIII for the unilateral institution of the insurance program undertaken on December 1, 1974.

As to the contention that the institution of the new insurance program was legal because of past practice wherein Respondent had altered the contract without objection from the Union, it appears that Respondent's past practice in altering the contract without union objection related to "class" wage increases, which were permitted by the contract and were not "across-the-board" increases. It appears that the institution of the insurance program was the first time any alterations had been made in the collective-bargaining agreement not concerned with wages. Thus, it is clear that any alterations in the contract made in the past were related to wages as permitted by the contract and obviously would not give rise to an objection by the Union. Therefore, it is found that the past unilateral action with respect to wages cannot serve as a basis for finding as lawful Respondent's failure to notify the Union in advance of its implementation of the new program or its subsequent refusal to furnish the information requested with respect to the insurance program.

It is well settled that the institution of unilateral changes, relating to a mandatory subject of bargaining, without notification or consultation with the Union, is a violation of Section 8(a)(5) and (1) of the Act. *N.L.R.B. v. Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S.

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7. However, there is a discussion hereinbelow with respect to the Union's reference to this section in its above-mentioned letter of February 13, 1975.

736 (1962). See also *San Luis Obispo County and Northern Santa Barbara Restaurant and Tavern Association,* 196 NLRB 1082, 1088 (1972); *John E. Holkko d/b/a Lifetime Shingle Company,* 203 NLRB 688, 693 (1973); *Condon Transport, Inc.,* 211 NLRB 297, 302 (1974).

Consequently, it is concluded that by unilaterally instituting the new insurance program Respondent violated Section 8(a)(5) and (1) of the Act.

It is noted, however, that although the Union subsequently learned of the new insurance program, it made no objection thereto, filed no grievance with respect thereto, or in any way signified that it was interested in bargaining with respect to it, until its letter of February 13, 1975 (some 2½ months after the program had been implemented). It is further noted that in its said letter to Higgins the Union wrote as follows:

> It has been brought to our attention through the Reno Employees Council that the Sparks Nugget is no longer a participant in the medical care plan as outlined in Article XVIII of the collective bargaining agreement under sections three and four of the above article. The medical plan must be equal to or in access [sic] of the contract provisions.
>
> Section two provides for the continuation of the medical plan through May 15, even though a new contract has not been signed.
>
> We request that a copy of your policy be sent to this office so that it can be examined for determination that it complies with the collective bargaining agreement.

Moreover, Colin McKinlay, who was assigned to work as an official of the Union during the time material herein, and was called as a witness by the General Counsel, credibly testified as follows:

> THE WITNESS: I had one telephone conversation with Jerry Higgins probably January of 1975, in which I

requested or we had a discussion about the change in the conditions of the health and welfare plan.

JUDGE GILBERT: You had a question with respect to the change?

THE WITNESS: Yes.

Q. (By Mr. Rhoads) What was the basis for your calling Mr. Higgins? What was your reason for calling him?

A. Well, we felt we needed a copy of the plan so that we could determine whether it—it fell within the guidelines of the contract, whether it met the contractual provisions.

Q. Were there any grievances discussed in this meeting or in this conversation?

A. I believe the one grievance, yes.

Q. Which you previously testified to?

A. Yes.

Q. What was your conversation with Mr. Higgins, can you recall?

A. Well, one of the employees at the Nugget tried to obtain benefits and sick pay and was refused; and we wanted to know why.

And his answer was that there was a mistake—a mistake was made someplace; and that the employee should resubmit the claim; and that it would be taken care of.

It appears from the above-quoted letter and the credited testimony of McKinlay that the Union did not object to the unilateral implementation of the program or request that Respondent bargain about its implementation, but rather was concerned as to whether the program was "acceptable" under the provisions of section 3, Article XVIII, of the collective-bargaining agreement.

It further appears from the failure of the Union to lodge any protest with regard to the unilateral implementation of the program, the position taken by the Union as to com-

pliance with section 3, article XVIII, and the attempt, disclosed in McKinlay's testimony, to obtain benefits for an employee under the program, that the Union condoned Respondent's failure to consult with it prior to its implementation. Consequently, while I find that the unilateral implementation was violative of Section 8(a)(5) and (1) of the Act, in view of said condonation, it appears appropriate to limit the remedy therefor to an order to cease and desist from unilaterally altering or modifying the terms and conditions of a collective-bargaining agreement it may have with the Union.

Since I find hereinbelow that Respondent has unlawfully withdrawn recognition from the Union and recommended that it be ordered to bargain with the Union, it follows that the refusal to furnish a copy of the insurance policy inhibits the Union from meaningfully bargaining with respect to it (a mandatory subject of bargaining) and that said refusal is violative of Section 8(a)(5) and (1) of the Act. *Hotel Enterprises, Inc., d/b/a Royal Inn of South Bend,* 224 NLRB 810 (1976). The remedy which will be recommended for said violation is that Respondent be ordered to comply with the Union's request for a copy of the current insurance policy covering the employees in the above-described bargaining unit.

G. *Withdrawal of Recognition and Refusal To Bargain*

As stated hereinabove, Respondent joined REC in 1960 and in 1961 became subject to the 1961-63 collective-bargaining agreement between REC on behalf of its members and the Union, as well as the succeding 3-year agreements, including the 1972-75 agreement due to terminate by its terms at the end of February 15, 1975; in anticipation of the

termination of the 1972-75 agreement, the Union wrote to REC and Respondent on November 15, 1974 requesting arrangements be made for negotiations with respect to modifications of the then current contract; on December 9, Respondent advised REC of its withdrawal from that multi-employer association; on December 12, both Respondent and REC advised the Union that the collective-bargaining agreement would be terminated on February 15, 1975, and REC further advised the Union that it was no longer authorized to represent certain employers, including Respondent; on December 13, and again on December 17, the Union wrote to REC and Respondent requesting arrangements to commence contract negotiations; by letter dated December 20, 1974, Respondent, through its attorney, advised the Union that it had a "genuine doubt" that the Union "continues to represent an uncoerced majority" of an appropriate unit of Respondent's employees; and it is undisputed that Respondent has withdrawn recognition of the Union as the exclusive bargaining representative of the above-described appropriate bargaining unit of its employees and refuses to bargain with the Union with respect to its said employees.

There are essentially two issues which must be resolved in determining whether Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition and refusing to bargain:

(1) Is there a presumption (which is rebuttable) that the Union continued to represent a majority of Respondent's employees in an *individual bargaining unit* of its bar and culinary workers after its withdrawal from the *multiemployer bargaining unit.*

(2) If there is such a presumption, has Respondent rebutted it by proving that at the time it withdrew recognition it had a reasonable doubt based on objective considerations

that the Union enjoyed the support of a majority of the employees in said individual bargaining unit.

H. *Re the Presumption of Majority*

The Board stated in *Walter E. Heyman d/b/a Stanwood Thriftmart,* 216 NLRB 852, 853 (1975):

> A contract, lawful on its face, raises a presumption that the contracting union was the majority representative at the time the contract was executed, during the life of the contract, and thereafter.[8]

It is asserted by the General Counsel in the instant case that a presumption of continued majority status should be found based on the series of 3-year contracts for a multi-employer bargaining unit commencing in 1961 to which Respondent was bound. But the question arises whether or not a presumption of continued majority, based on the original and subsequent *multiemployer* contracts to which Respondent was bound, can be held to be applicable to a single-employer bargaining unit of Respondent's employees which has been severed from the larger unit. While there never has been a contract between Respondent and the Union in the single-employer unit, it appears appropriate to infer that at the time the Union commenced representing Respondent's bar and culinary employees in the multi-employer bargaining, as well as at the time Respondent became bound by the 1972-1975 agreement, a majority of Respondent's said employees desired representation by the Union.

Unless a majority of an employer's employees desires representation by a union, that employer may not lawfully

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8. *Shamrock Dairy, Inc.*, 119 NLRB 998, 1002 (1957), and 124 NLRB 494, 495-496 (1959), enfd. 280 F.2d 665 (DC Cir.), cert. denied 364 U.S. 892 (1960).

force representation on them by joining a multiemployer bargaining arrangement. *Mohawk Business Machines Corporation,* 116 NLRB 248 (1956); *Dancker & Sellew, Inc.,* 140 NLRB 824 (1963), enfd. 330 F.2d 46 (C.A. 2, 1964). Thus, Respondent would have violated the Act in 1961, when it became party to the 1961-63 multiemployer collective-bargaining agreement if a majority of its employees did not desire representation, or at the time it became a party to the 1972-75 agreement. Any unfair labor practice charge relating to such a violation would have had to have been filed within 6 months from such time. The Board stated in *North Bros. Ford, Inc.,* 220 NLRB 1021 (1975):

> Section 10(b) of the Act confines the issuance of unfair labor practice complaints to events occurring during the 6 months immediately preceding the filing of a charge and has been interpreted by the Supreme Court to bar finding any unfair labor practice, even though committed within that period, which turns on whether or not events outside that period violated the Act. *Bryan Manufacturing Co.*[3] The Court, holding that maintenance and enforcement of a contract more than 6 months after recognition of a minority union did not violate the Act, relied in part on the legislative history indicating that Congress specifically intended Section 10(b) to apply to agreements with minority unions in order to stabilize bargaining relations. Noting that labor legislation traditionally entails compromise, the Court observed
>
> > that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the overall purpose of the Act to secure."[4]

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3. *Local Lodge No. 1424, IAM, AFL-CIO* [*Bryan Manufacturing Co.*] *v. N.L.R.B.,* 362 U.S. 411 (1960).

4. Id. at 428.

The Board, in light of *Bryan,* has since held that Section 10(b) is applicable to a refusal-to-bargain defense that the bargaining relation was unlawfully established.[5]

5. *Barrington Plaza and Tragniew, Inc.,* 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom, Tragniew, Inc.,* and *Consolidated Hotels of California v. N.L.R.B.,* 470 F.2d 669 (9th Cir., 1972); *Roman Stone Construction Company, and Kindred Concrete Products, Inc.,* 153 NLRB 659, fn.3 (1965).

It follows from the above decision of the Board that the Respondent cannot now attack either its initial recognition of the Union or its continued recognition of the Union at the commencement of the 1972-75 agreement on the ground that at either time the Union did not represent a majority of its employees. Consequently, it appears appropriate to conclude that a presumption exists that during the term of the 1972-75 agreement the Union continued to enjoy the support of a majority of Respondent's employees. However, said presumption of majority status may be rebutted by Respondent "by affirmatively establishing that the union has in fact lost its majority status,[9] or shows that it has sufficient objective bases for reasonably doubting the union's continued majority status." *James W. Whitfield d/b/a Cutten Supermarket,* 220 NLRB 507 (1975). Considered hereinbelow is the issue of whether Respondent had sufficient objective bases for reasonably doubting the Union's continued majority status.

I. *Re Respondent's Bases for Doubt of Majority*

Set forth hereinbelow is an analysis of the factors relied on by Respondent in its brief and additional factors to

9. There is no evidence in the record that the Union in fact lost its majority status. Respondent attempted to introduce evidence purportedly to prove such loss by issuing subpenas to a Government agent and for the Union's records. Petitions to quash said subpenas were granted during the course of the hearing.

which Carr testified, as proof that it had a reasonable doubt, based on objective considerations, of the Union's majority.

It appears from Carr's testimony that it was he who determined that the Union did not represent a majority of the approximately 700 employees in the bar and culinary departments of Respondent. He testified that on or about August 22, 1974, he read an article in a newspaper, "The State Journal," which quoted an official of the Union as stating that the Reno-Tahoe area "is less than 20 percent" unionized, and that that "alerted" him to the possibility that a majority of Respondent's employees did not support the Union. It further appears from his testimony that shortly thereafter he started conferring with six of the supervisors in the bar and culinary departments with the purpose of ascertaining from them what the sentiments of the employees were regarding the Union. It further appears that he instructed them to "keep their eyes and ears open" to learn what the employees' comments were relating to their attitude toward the Union. These conferences and reports to him from the six supervisors apparently extended from early September to the end of November 1974. Carr testified with respect to their reports on employees' sentiments as follows:

1. With respect to Yves Lesquereux, the executive chef, who supervised approximately 200 employees:

> He said he heard several comments from his people that they did not want a union, wished the—"wished the union'd get off my back; what can the union do for us; what has the union done for us; the Nugget has given us more in benefits and wages than the union ever has; do I have to belong to the union to keep my job."

Q. Did Mr. Lesquereux say anything else during this conversation concerning the remarks of employees under his supervision?

A. Oh, I don't know it was this meeting or not, but he felt at least 70 percent of his people were not in favor of a union.

2. With respect to Robert Turner, assistant bar manager, who supervised about 35 employees, Carr testified that Turner told him of the remarks made by employees which were virtually the same as had been reported by Lesquereux and that "he felt" that "the majority" of the employees under him "did not want a union."

3. With respect to Emily Budiga, dining room supervisor, who had approximately 90 employees under her, Carr testified that she told him what remarks employees made to her about the Union (which again were virtually the same as those Lesquereux reported had been made to him) and that "she felt that a majority of her people . . . did not favor a union."

4. With respect to Gene Berry, assistant restaurant director, who supervised the culinary workers (approximately 600), Carr testified that "his comment to me was that he felt that a majority of his people did not favor a union."

5. With respect to Scott Steel, dining room supervisor, who had about 35 employees under him, Carr testified as follows:

> His comment to me was, "most of my people are college students," which they are, "and they could care less about a union. Number one, they don't want to pay dues, number two they don't think they can do them any good."

6. With respect to William Carrington, also a dining room supervisor with approximately 50 employees under

him, Carr testified that Carrington told him that a "majority" of his employees "did not favor a union."

Carr further testified that he relied on the above-mentioned reports to him from the supervisors in deciding that the Union was not supported by a majority of the bar and culinary employees.

In my opinion the above reports of the supervisors to Carr do not constitute "objective considerations." While it is true that Carr's testimony of their reports is hearsay testimony and would be inadmissible in evidence for the truth of the contents of the reports, said testimony is admissible for the fact that the reports were made to him. In any event, I do not rely on the hearsay rule of evidence in arriving at the above conclusion. Rather, I rely on the following factors: Carr made it clear to his supervisors that he was strongly opposed to the Union; the supervisors reasonably must have realized that he desired a report discrediting union support among the employees; and, in such circumstances, Carr could not have reasonably relied on the subjective evaluations of the supervisors who based said evaluations on information merely derived from his instructions to keep their eyes and ears open. It is noted that none of the supervisors was called to testify, and there is no probative evidence of any employee voicing lack of support of the Union to any of said supervisors or to Carr. "To be of any significance, the evidence of dissatisfaction with a validly recognized incumbent union must come from the employees themselves, not from the employer on their behalf." *Terrell Machine Company,* 173 NLRB 1480, 1482 (1969).

It appears from Carr's testimony that he also relied upon the heavy turnover of his employees. According to his testimony, he had a survey made of the turnover "at the Nugget"

during periods of 1972, 1973, and part of 1974 which disclosed that 3,700 people had been hired and 3,400 had been terminated. The survey also indicated that in 1972 there were 475 employees "in the bar and culinary unit" and by 1974 there were 700 employees in said unit. The Board has held that, it is presumed, "absent evidence that would justify a contrary conclusion,[10] new employees will support the union in the same ratio as those whom they have replaced," and that "turnover of employees cannot, by itself, be used as a basis for belief that the Union has lost majority support." *Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center,* 224 NLRB 1618, 1620 (1976).

Carr also cited as factors in arriving at his doubt of majority representation that the State of Nevada has a right-to-work law; that there was no union-security clause in the then current contract and that there was no dues checkoff provision in said contract. None of these facts was contradicted. In *Wald Transfer & Storage Co. and Westheimer Transfer & Storage Co., Inc.,* 218 NLRB 592 (1975), citing the decisions in *Terrell Machine Company,* 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), and *N.L.R.B. v. Gulfmont Hotel Company,* 362 F.2d 588 (C.A. 5, 1966), the Board stated:

> It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the Union may not choose to give it their financial support *or* participate as members.

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10. There is no such evidence in the record.

Based on the above, I am of the opinion that the absence of provisions in the then current contract (at the time the belief of lack of majority was reached) for dues checkoff and union security cannot be relied on as objective considerations for a reasonable belief that the Union lacked majority support.

Carr further testified that he relied on the lack of union activity in that only one grievance had been filed by the Union during the duration of the 1972-75 agreement. The record fails to disclose that any grievances were filed which should have been pressed and were not, that any working conditions existed which warranted the filing of grievances, or that the Union was lax in carrying out its obligations under the collective-bargaining agreement. The fact that only one grievance was filed, as above stated, and was later dropped does not, in my opinion, constitute a valid basis for doubting the Union's majority representation. *North American Manufacturing Company,* 224 NLRB 1252 (1976); *A. W. Thompson, Inc.,* 216 NLRB 710, 712, 714 (1975).

In addition to the factors cited in Respondent's brief, Carr also testified that no election had ever been conducted among the bar and culinary workers. As stated hereinabove, it is presumed that when Respondent agreed to be bound by the contracts between REC and the Union, extending from 1961 to 1975, it did not violate the Act by doing so, i.e., absent a majority support for the Union, and it cannot raise the issue that there was a lack of such majority support at said times as a defense in this proceeding. Moreover, the Board, in *White Castle System, Inc.*, 224 NLRB 1089 (1976), adopted the conclusion of the Administrative Law Judge that "in fact that no election had ever been held is not a valid consideration on which to predicate a doubt of majority status."

Another factor not cited in Respondent's brief but to which Carr testified is that he relied on reports in the public media that the Union was in trusteeship due to the lack of funds because of poor membership and that during a "three month period" (presumably just prior to his determination that the Union lacked majority representation) there was more activity by the Union's business agents in the Nugget "than we had seen during the term of the contract." I am far from persuaded that the news reports of the Union's poor financial situation or the increased activity of its agents (presumably to recruit more members) are factors which Carr could reasonably rely on as objective bases for a belief that the Union lacked majority support among Respondent's employees.

Based on my above analysis of the factors which Carr testified he relied on as a basis for his reasonable doubt of the Union's majority support, I am led to conclude that Respondent has failed to rebut the presumption that the Union enjoyed majority support of the employees in the above-described appropriate bargaining unit. Consequently, I am further led to conclude therefrom and all the circumstances herein that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing its recognition of the Union as the exclusive bargaining representative of the employees in said unit and by refusing to bargain with the Union as said representative.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, as set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce

among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union and by refusing to bargain with the Union as the exclusive representative of its employees in the aforesaid appropriate unit, I will recommend that Respondent be ordered to recognize and, upon request, to bargain in good faith with the Union as the exclusive representative of its employees in that unit.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the policies of the Act for the Board to assert jurisdiction.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining a rule which prohibits solicitation on Respondent's premises by employees after their shift has been completed, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. By unlawfully interrogating Gail Launius on October 17, 1974, Respondent violated Section 8(a)(1) of the Act.

5. By issuing John Dyer a warning notice on or about January 20, 1975, Respondent violated Section 8(a)(3) and (1) of the Act.

6. Sparks Nugget Employees' Council is a labor organization within the meaning of Section 2(5) of the Act and Respondent, by instigating, assisting, and dominating said Council, violated Section 8(a)(2) of the Act.

7. All employees employed by Respondent in its bar and culinary operations at its Sparks, Nevada, operations, excluding all other employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

8. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

9. By its unilateral implementation of a new and different insurance program for its employees in the above-described bargaining unit on December 1, 1975, Respondent violated Section 8(a)(5) and (1) of the Act.

10. By refusing to comply with the Union's request for a copy of the new insurance program, Respondent violated Section 8(a)(5) and (1) of the Act.

11. By withdrawing recognition from the Union and by refusing to bargain with the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act and has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, Sparks Nugget, Inc., d/b/a John Ascuaga's Nugget, Sparks, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining any rule or regulation prohibiting its employees from soliciting on its premises after their shifts have been completed unless such prohibition is demonstrably necessary to maintain production, discipline, or security.

(b) Unlawfully interrogating employees concerning their relationship to and activities upon behalf of Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, or any other labor organization.

(c) Issuing warning notices to employees in order to deter them from supporting or engaging in activities upon behalf of said Union, or any other labor organization.

(d) Instigating, assisting, or dominating any labor organization in which its employees participate and maintaining and dealing with Sparks Nugget Employees' Council.

(e) Unilaterally instituting any alterations, modifications, or changes in the terms and conditions of employment which are mandatory subjects of bargaining with the aforesaid Union.

(f) Refusing to furnish to said Union a copy of its current insurance program covering employees represented by said Union.

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11. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(g) Refusing to recognize and bargain with said Union as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

> All employees employed by the Respondent in its bar and culinary operations at its Sparks, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

(h) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and, if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

> All employees employed by the Respondent in its bar and culinary operations at its Sparks, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

(b) Furnish said Union, upon request, a copy of its current insurance policy covering its employees in the above-described bargaining unit.

(c) Remove from the personnel file of John Dyer the warning notice it issued to him on or about January 20, 1975.

(d) Post at its Sparks, Nevada, place of business copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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12. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

No. 80-1083

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

BARNEY'S CLUB, INC. and SPARKS NUGGET, INC.
d/b/a JOHN ASCUAGA'S NUGGET
Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD, and
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION,
LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS
INTERNATIONAL UNION, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board abused its discretion in holding that the presumption of majority status, derived from petitioners' voluntary recognition of the Union as the representative of their own employees, could be defeated by petitioners' subsequent withdrawal from a multiemployer bargaining unit.

2. Whether the Board's finding that petitioners had not established a reasonably grounded doubt of the Union's majority status was supported by substantial evidence.

3. Whether the Board's finding that petitioners promulgated and maintained illegal and overbroad no-solicitation rules was supported by substantial evidence.

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No. 80-1083

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INTERNATIONAL UNION, AFL-CIO,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 623 F. 2d 571. The decisions and orders of the National Labor Relations Board are reported at 227 NLRB 414 (Barney's Club, Inc.) and 230 NLRB 275 (Sparks Nugget, Inc.).

JURISDICTION

The judgment of the Court of Appeals relating to Barney's Club, Inc. was entered on August 18, 1980. The judgment of the Court of Appeals relating to Sparks Nugget, Inc. was entered on September 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This respondent did not receive a copy of the petition until January 2, 1981.

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a) provides in relevant part:

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7***;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees***."

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) provides in relevant part:

> "Whenever it is charged that any person has engaged in or is engaging in such unfair labor practice, the Board *** shall have power to issue and cause to be served upon such a person a complaint stating the charges *** and containing a notice of hearing ***: *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. ***."

STATEMENT OF THE CASE

The brief of the National Labor Relations Board in Opposition herein accurately states the case.

ARGUMENT

I

THIS PETITION REITERATES ARGUMENTS ALREADY MADE TO THIS COURT

Predictably, petitioners' initial argument is an attempt to convince this Court that these cases are somehow different from those already determined. See, for example, *N.L.R.B. v. Tahoe Nugget, Inc. d/b/a Jim Kelley's Tahoe Nugget* and *N.L.R.B. v. Nevada Lodge,* 584 F.2d 293 (9th Cir., 1978) *cert. denied* 442 U.S. 921, *reh. denied* 444 U.S. 887 (1979) (United States Supreme Court No. 78-1379) and *Sahara-Tahoe Corporation v. N.L.R.B., et al.,* 581 F.2d 767 (9th Cir., 1978) *cert. denied* 442 U.S. 917, *reh. denied* 444 U.S. 888 (1979) (United States Supreme Court No. 78-1465). Most recently, the same argument was presented in *Silver Spur Casino v. N.L.R.B. et al.,* and related cases, United States Supreme Court No. 80-660. No amount of characterization will allow petitioners to escape the fact that the underlying dispute in all these cases arose from the disintegration of the same multiemployer bargaining unit and the subsequent refusal of all member employers to bargain with the Union, and that the so-called "objective considerations" advanced by the employers to justify their refusal to bargain were virtually the same in each case.

This Court's rationale in denying certiorari in those cases is equally applicable here. The "conflict" which peti-

tioners seek to create did not exist when the prior petitions were considered, nor does it exist now. After recognizing, in conformity with all other circuits, that the Union was availed of the presumption of continued majority support, the Board and court found that petitioners failed to rebut the presumption by establishing a good faith reasonable doubt of the Union's status sufficient to justify their refusal to bargain. The court found the petitioners' evidence, cumulatively and separately, to be "ambiguous" and "equivocal". (Pet. App. 10)[1] No court of appeal absolves petitioners from the responsibility to produce cogent, unequivocal evidence as the factual predicate for refusing to bargain with the Union.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS CREATED BY THE COURT'S HOLDING THAT THE PRESUMPTION OF MAJORITY STATUS APPLIES IN THIS CASE

The court below correctly recognized that petitioners' voluntary recognition of the Union as the bargaining representative of their respective bar and culinary employees

---

[1]As with the petitions from other employers, petitioners' contention here that the "Board, with Court approval, ignored" certain evidence is hyperbole. (Pet. 8) The Board and court below patiently considered the evidence and found it "ambiguous" and "equivocal." A more realistic explanation of the Board and court's treatment of petitioners' showing is that unsubstantiated assertions were not treated as facts.

Nor may petitioners truthfully suggest that the cumulative weight of its "evidence" was not considered. The court emphasized that it had viewed the cumulative "evidence" and still found it deficient. (Pet. App 10)

gave rise to a continuing presumption of the Union's majority support among those employees. (Pet. App 5-6).[2] As this Court has stated, such recognition without a Union majority would violate the Act. *International Ladies Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 737-739 (1961). Once established, the presumption of majority support continues throughout the term of a collective bargaining agreement and beyond. *Celanese Corp. of America*, 95 N.L.R.B. 664, 672 (1951), cited with approval in *N.L.R.B. v. Burns Security Service*, 406 U.S. 272 n.2 (1972).

On this predicate,[3] the court of appeal adopted the reasoning of *N.L.R.B. v. Tahoe Nugget, supra*, 584 F.2d 293 at 303, (Pet. App. 7) that the presumption subsisted following petitioners' withdrawal from the multiemployer unit:

> "When respondents joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing:

---

[2]The court stated its reliance on *N.L.R.B. v. Tahoe Nugget, supra; N.L.R.B. v. Nevada Lodge, supra; Sahara Tahoe Corp. v. N.L.R.B., supra; N.L.R.B. v. Sierra Development Co.*, 604 F.2d 606 (9th Cir., 1979); *N.L.R.B. v. Carda Hotels*, 604 F.2d 605 (9th Cir., 1979). See also, *N.L.R.B. v. Frick Co.*, 423 F.2d 1327 (3rd Cir., 1970); *N.L.R.B. v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2nd Cir., 1973).

[3]Petitioners' continued assertion that the Board adopted some "derivative" presumption flowing from the multiemployer bargaining relationship (Pet. 12) is without foundation. There was no concatenation of presumptions applied here, only the single presumption based on petitioners' voluntary acts of recognition.

> employers normally will not knowingly violate the law and union fraud is rare. Continued membership in the larger unit does nothing to negate this principle even though the larger unit becomes the appropriate one for bargaining. The original presumption subsists: withdrawal from the unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor union representation." (footnote omitted)

No case cited by petitioners militates against application of the presumption in the present situation. In *N.L.R.B. v. Alvin J. Bart and Co.*, 598 F.2d 1267 (2nd Cir., 1979) (Pet. 8), the court *adopted* the presumption of continued majority support described above, and emphasized that rebuttal of the presumption required "clear and convincing evidence of loss of Union support", more than "unfounded speculation or . . . subjective state of mind." *Id.* at 1271. In finding that the employer had presented sufficient objective evidence to rebut the presumption, the court relied heavily on an antiunion petition signed by three-fourths of the employees in the appropriate unit. *Id.* at 1272. No such objective evidence was presented here.

W & W Steel Co. v. N.L.R.B., 599 F.2d 934 (10th Cir., 1979) (Pet. 9), a case petitioners claim is "on all fours" with the present dispute, involved a successor employer's obligation with respect to an ongoing collective bargaining relationship. The court emphasized that the "critical question" was that of the employer's status as a "successor" and its decision was predicated on that status. *Id.* at 936-938. Clearly, no such issue exists here, where the petitioner's obligation to bargain with the Union resulted from

their own acts of recognizing the Union as the representative of a majority of their employees when petitioners joined the multiemployer bargaining unit.

Petitioners' reliance on *N.L.R.B. v. Randle-Eastern Ambulance Service, Inc.* 584 F.2d 720 (5th Cir., 1978) (Pet. 10) further demonstrates the fallacy in their argument. In that case, the presumption of continued majority support was applied. To rebut the presumption, the employer presented unequivocal evidence which established a lack of majority support. Acknowledging that it was a "close case", the court found that the presumption had been rebutted. Here, the Board and court employed the same legal standard, but found that petitioners failed to present the requisite unequivocal evidence and hence, failed to rebut the presumption. (Pet. App. 10).

Nor is *N.L.R.B. v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir., 1965) (Pet. 10) in conflict with the Board or court's holding. As petitioners acknowledge, in *Kaase*, the recognition of the union was based upon an election of employees within a multiemployer unit rather than by voluntary recognition, as here. In the *Kaase* situation, the union must receive a majority of votes of the participating employers in the unit to obtain representative status. Thus, the union may become majority representative even though it did not receive votes of a majority of the employees of each individual employer member of the multiemployer unit. In the present case, the presumption was not derived from the union majority in the multiemployer unit, but rather from petitioners' acts of voluntarily recognizing the Union as the majority representative of their

employees. Petitioners' reliance on *Kaase* is unavailing. Certainly, no case cited by petitioners holds that the presumption of continued majority support should not be applied here: the purported "conflicts in the circuits" is imaginary.

In essence, petitioners' argument is nothing more than a quibble about the sufficiency of its evidentiary presentation in an attempt to rebut the presumption of continued majority support. Petitioners disguise this quibble as an argument that the Board created an "irrebutable presumption." (Pet. 14). Thus, petitioners confuse the concept of "irrebutable presumption" with their failure to produce sufficient evidence to rebut the presumption. In adopting the reasoning of *Sahara Tahoe Corp. v. N.L.R.B., supra,* 581 F.2d 767, 772, the court below acknowledged that:

> ". . . the cumulative weight of all of the evidence is not enough to rebut the presumption. It is ambiguous at best and we see no reason to disturb the Board's finding that the web [of circumstances] contains not a single thread of evidence that the employees themselves had told [the Hotel] that they no longer wanted the Union to represent them. Indeed, the web contains not a single thread of evidence that reflects or even purports to reflect the sentiments of the employees themselves—any unit employee much less a majority of the unit employees—on the question of union representation. Absent such thread, the web of circumstances is like the Cheshire cat's grin—nothing behind it."

Petitioners' argument is thus reduced to a claim that the Board and court erred in the evidentiary weight accorded each of the asserted objective considerations, since similar

factors, *once established* in cases from other circuits, had been held to justify a refusal to bargain. (Pet. 6-12). In overlooking the fact that their "evidentiary" showing never rose to the level of objective factors, petitioners effectively confess that they engaged in brinksmanship to thwart collective bargaining among its employees. As another court of appeals stated in an analogous context, ". . . one who engages in 'brinksmanship' may easily overstep and tumble into the brink." *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 372 (7th Cir., 1967). Clearly, petitioner's disagreement with the Board's findings with respect to the weight of the evidence, or factual conclusions to be drawn therefrom, does not merit review by this Court. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-491 (1951). Moreover, because such an evidentiary determination turns on the totality of all the circumstances, review of the Board's findings cannot have a substantial impact on other litigants.

The comment of the court below, to which petitioners allude as support for their contention that there is "conflict in the circuits", is merely an acknowledgment that the presumption is not irrebuttable and that presentation and proof of valid objective considerations will justify a refusal to bargain.[4] However, such evidence was not presented here. The court recognized that requiring such an evidentiary showing facilitated attainment of the Act's underlying purpose: industrial peace. (Pet. App. 15).

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[4]The court below stated that cases from other courts "*may* have found the presumption rebutted upon similar or even weaker evidence than was presented in these cases." (Pet. App. 14-15. See, Pet. 6.)

III

THE BOARD'S FINDING THAT PETITIONERS PROMULGATED AND MAINTAINED ILLEGAL NO-SOLICITATION RULES IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Petitioners' effort to create conflict where none exists is further evident in their argument regarding their no-solicitation rules. (Pet. 19-28). Petitioners concede, as they must, that a rule prohibiting employee solicitation during nonworking time in nonwork areas is presumptively invalid in the absence of legitimate special circumstances warranting adoption of such a rule. *Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793, 803 n.10, (1945), also *N.L.R.B. v. Magnavox Co.,* 415 U.S. 322, 325, *reh. denied* 416 U.S. 952, (1974) (Pet. 19). Petitioners cite and thereby accept the rationale of *Peyton Packing Company,* 49 N.L.R.B. 822 at 833-834 (1940) which held, in pertinent part:

> "It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline."

Petitioners contend that Nevada's regulation of its gambling industry is a "special circumstance" which permits them to promulgate broad, restrictive, no-solicitation rules.

Although petitioners contend that they submitted "evidence that the Nevada gaming industry requires a specialized set of rules regarding in-house employee solicitation" (Pet. 19), in reality, no such evidence was produced nor does it exist. What petitioners submitted was a hodge podge of Nevada regulations concerning such matters as work permits for "gaming employees" (Pet. 22), and a requirement that casinos exclude persons "of notorious or unsavory reputations" or convicted felons. (Pet. 22). By definition, these regulations have nothing to do with employees represented by the Union.[5] None of the statutes cited by petitioners are relevant to the no-solicitation issue, nor have petitioners even attempted to explain how permitting off-duty employees to exercise their guaranteed rights at limited times and locations would arguably transgress any Nevada statute or infringe on "legitimate security purposes."

Moreover, petitioners' arguments are particularly hollow in light of the fact that the Board and court *agreed* that petitioners could ban all solicitations in the gambling areas of their establishments. The Board stated (Pet. App. 52):

> "Thus, Respondent [petitioners here] could lawfully ban all solicitation in the gambling area, but it could

---

[5]Nevada Revised Statute, § 465.335(1)(a), provides that the term "gaming employee" does not include bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages." This is precisely the group of employees represented by the Union (Pet. App. 101).

> not lawfully maintain a general ban on solicitation in the public bars or restaurant."

While the court adopted the Board's rationale in finding the no-solicitation rules improper, it found the Board's order to be overbroad, and modified it to insure that any solicitation must be in nonpublic areas. (Pet. App. 19).[6] Even assuming *arguendo* that "special circumstances" existed, the decision properly defined the boundaries of a no-solicitation rule in conformity with the decisions of this Court. Petitioners' argument is actually a suggestion that they be able to ban all employee solicitations on their premises regardless of the circumstances. The Board and court's rejection of this suggestion was not a product of a refusal to consider evidence, but rather, a rejection of petitioners' weak and irrelevant presentation.

Petitioners' final argument that the Board and court "failed to consider whether alternate means of communication . . . existed by which the Union could advance its message" is misleading for two reasons (Pet. 24-28). First, this issue was never raised at any stage of the NLRB proceedings nor before the court of appeals. Petitioners' failure to raise this issue prevents them from raising it here and claiming that a conflict in the circuits exists.

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[6]Petitioners have also failed to point out that they encouraged their employees to remain on the premises after their shifts, and to socialize in the bars with fellow employees or supervisors (Pet. App. 48). Certainly, the petitioners cannot prohibit solicitations under such circumstances. *Marshall Field & Co.*, 98 N.L.R.B. 88 (1952) enf. denied in part, 200 F.2d 375 (7th Cir., 1952), also *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 506 (1978).

Secondly, even if the issue had been raised below, the decisions were correct. Although petitioners promulgated a rule relating both to solicitations *and* distribution of literature (Pet. App. 48, 103), the proceedings below challenged only the portion of the rule relating to employee solicitations. The challenged portion of the rule in question stated:

> "Solicitations on company premises by employees after employees shift has been completed is prohibited.
>
> • • • • •
>
> Violation of any of the above rules will result in immediate disciplinary action, including discharge.[1]

The Board, with court approval, has long recognized that rules governing oral solicitations are necessarily different from those governing distribution of literature, and that less employer infringement is tolerated in the area of oral solicitations. *Stoddard-Quirk Manufacturing Corp.*, 138 N.L.R.B. 615 (1962). Petitioners have ignored this distinction, and premise their argument on decisions involving distribution of literature on the employer's premises. No case cited by petitioners requires the Board or

---

[1]The portion of the rule *not* at issue here states (Pet. App. 48, 103:

> Solicitations of any type by employees during working time is prohibited.
>
> • • • • •
>
> Distribution of literature of any type or description by employees during working time is prohibited.
>
> Distribution of literature of any type or description in working areas is prohibited.

court to consider alternate means of communication in the context of an oral solicitation rule.[8]

Petitioners' argument also ignores the fact that they were unable to establish any "special circumstances" to justify a complete ban on employee solicitations during nonworking hours in areas where they actually encouraged employees to be. (Pet. App. 48). In *McDonnell Douglas Corporation v. N.L.R.B.*, 474 F.2d 539, 545 (8th Cir., 1973) (Pet. 21, 25),[9] the court emphasized that before the Board engaged in any "balancing" or consideration of alternate means of communication, it was incumbent on the employer to make a "creditable showing of special, justifying circumstances." Thus, the Board and court's decisions were proper in light of petitioners' failure to make any showing of "special circumstances" to justify their broad no-solicitation and no-distribution rules.

---

[8]Petitioners cite several cases immaterial here. *N.L.R.B. v. Rockwell Manufacturing Co.*, 271 F.2d 109 (3rd Cir., 1959) (Pet. 24) and *Babcock v. Wilcox Co.*, 351 U.S. 108 (1956) (Pet. 25) both involved rules forbidding distribution of literature by employees or union organizers on company premises. No such issue is involved here. *N.L.R.B. v. United Steelworkers of America* 357 U.S. 357 (1958) (Pet. 25) involved a facially *valid* no-solicitation and no-distribution rule. The issue involved discriminatory enforcement of the rule; the rule was enforced against the union and employees, but violated by the employer. Here, the rule in question is facially invalid.

[9]The dispute in *McDonnell* arose when an insurgent union official attempted to distribute literature on the employer's premises. The no-solicitation, no-distribution rule there was *less* restrictive than the rule under consideration here because it permitted oral solicitations during nonworking hours. Moreover, the employer in *McDonnell* was able to establish "special circumstances" for the no-distribution rule based on the military sensitivity of its operation. No such showing was made in the present case.

CONCLUSION

For all of the above reasons, as well as for the reasons stated in the Brief For The National Labor Relations Board In Opposition; the Petition for Writ of Certiorari should be denied.

January 30, 1981

Respectfully submitted,

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Respondent Union

No. 80-1083

FILED
MAR 20 1981
ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1980

BARNEY'S CLUB, INC., ET AL. PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly concluded that petitioners violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition from and refusing to bargain with the union without having a reasonably based good-faith doubt of the union's majority support among their employees.

2. Whether the Board properly concluded that petitioners violated Section 8(a)(1) of the Act by promulgating a rule prohibiting employees from engaging in union solicitation during nonworking time on petitioners' premises.

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In the Supreme Court of the United States

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v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 623 F. 2d 571. The decision and orders of the Board (Pet. App. 42-132) are reported at 227 N.L.R.B. 414 (*Barney's*) and 230 N.L.R.B. 275 (*Sparks Nugget*).

JURISDICTION

The judgment of the court of appeals in *Barney's* was entered on August 18, 1980 (Pet. App. 37-39); the judgment in *Sparks* was entered on September 12, 1980 (Pet. App. 28-31). Justice Rehnquist extended the time for filing a petition for a writ of certiorari to January 2, 1981 in *Barney's* and to January 4, 1981 in *Sparks*. The petition for a writ of certiorari was filed on January 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 158(a), are set out at Pet. 3.

STATEMENT

1. Petitioner Barney's Club operates a casino, bar and restaurant in Stateline, Nevada (Pet. App. 45). Petitioner Sparks Nugget operates a hotel, casino, bar and restaurant in Sparks, Nevada (*id.* at 99). Since 1960, Sparks Nugget has been a member of the Reno Employers Council (the "Association"). In 1965, Barney's Club also joined the Association (*id.* at 46, 100). The Association represents its members in collective bargaining with various unions including Hotel, Motel, Resturant Employees and Bartenders International Union, AFL-CIO (the "Union") (*id.* at 45-46). When petitioners joined the Association, they became parties to the then existing collective bargaining agreement between the Union and the Association. In doing so, they recognized the Union as the representative of their bar and culinary employees (*id.* at 46, 100).

In August and December 1974, Barney's Club and Sparks Nugget respectively withdrew their memberships from the Association (Pet. App. 47, 100). Thereafter, petitioners refused the Union's request to enter into collective bargaining on an individual basis. Petitioners claimed they had a genuine doubt that the Union represented an uncoerced majority of their employees (*id.* at 47, 60, 101).

Since July 1974, Sparks Nugget and Barney's Club have posted no-solicitation rules at their respective casinos. Their rules, which are virtually identical, state in pertinent part that "[s]olicitation on company premises by employees after employees[']' shift has been completed is prohibited" (Pet. App. 47-48, 103-104).

2. Upon unfair labor practice charges filed by the Union, the Board concluded that petitioners had violated Section

8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union on an individual basis without having a reasonably based good-faith doubt of the Union's continued majority support among their employees (Pet. App. 42-43, 80-81, 86-87, 127).

Relying on its decision in *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget*, 227 N.L.R.B. 357 (1976), enforced, 584 F. 2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979), the Board held that petitioners' voluntary recognition of the Union established a presumption that the Union possessed the majority support of their employees, and that this presumption survived petitioners' withdrawal from the multi-employer bargaining unit (Pet. App. 42-43, 86-87). In light of this presumption, the Board concluded that petitioners were not entitled to withdraw recognition from the Union unless they could establish that the Union, in fact, no longer represented a majority of their employees or that petitioners had a reasonable doubt as to the Union's continuing majority status (*id.* at 71-72, 121). The Board determined that the evidence relied upon by petitioners to establish a reasonable doubt of majority status was insufficient to make either showing (*id.* at 72-81, 121-127).[1]

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[1]In asserting its doubt as to the Union's majority support, Barney's Club relied upon newspaper articles concerning organizing efforts to overcome low union membership and alleged financial difficulties in the Reno area, high turnover of unit employees, Union inactivity in representing employees, reports of employee dissatisfaction with the Union and Nevada's status as a right-to-work state. The Administrative Law Judge, "[a]fter considering all of the factors set forth above," concluded that Barney's Club "did not have substantial reasonable grounds for believing the Union had lost its majority status" (Pet. App. 80). He pointed out that the fact that "the Union was undergoing internal revisions does not indicate whether it continued to represent a majority" of Barney's Club employees (*id.* at 77). In addition, he observed that "a union may have financial difficulties whether or not it represents a majority, and organizational activity only indicates that a union desires more members than it has" (*ibid*). He explained that Barney's Club's

The Board further found that the identical no-solicitation rules promulgated by Barney's Club and Sparks Nugget

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reliance on high employee turnover was misplaced because, under Board precedent, "new employees will be presumed to support a union in the same ratio as those they may replace" (*ibid.*). Concerning the contention that the Union filed no grievances, the Administrative Law Judge noted that union representatives visited the premises on a regular basis and that there was no evidence that the Union had any knowledge of any contract violations or had any cause to believe that grievances should be filed (*id.* at 79). Regarding purported employee dissatisfaction with the Union, the Administrative Law Judge observed that the evidence concerned only a few employees in a unit of approximately 40 employees and that such a small group "falls far short of establishing that a majority * * * expressed displeasure with the Union" (*id.* at 78). The subjective evaluations of supervisors, he added, could not reasonably be used as a basis for doubting the Union's continued majority support (*id.* at 78-79).

Barney's Club also sought to show that the Union in fact did not represent a majority of its employees, pointing out that the Union was having financial difficulties and had been placed in trusteeship, that a membership drive had commenced and that some employees had expressed dissatisfaction with the way the Union was being run. The Administrative Law Judge observed that it would be "sheer speculation to make an evaluation based on those facts as to the number of [Barney's Club] employees the Union actually represented" (Pet. App. 74). Accordingly, the Administrative Law Judge concluded that these "matters in themselves and when considered in connection with the matters * * * relating to [the employer's] claimed reasonable doubt as to the Union's majority fall short of establishing that the Union in fact did not represent a majority of [the employer's] employees" (*id.* at 74).

Sparks Nugget also relied on alleged Union financial difficulty and organizational activity, turnover, lack of grievance activity and reported employee dissatisfaction with the Union (Pet. App. 121-127). As to the latter, the Administrative Law Judge noted that the evidence consisted of hearsay reports by supervisors to Sparks' General Manager Carr after Carr had made clear to his supervisors that he was strongly opposed to the Union (*id.* at 124). The Administrative Law Judge also observed that "none of the supervisors was called to testify, and there is no probative evidence of any employee voicing a lack of support of the

were overly broad and consequently unlawful under the Act (Pet. App. 43 n.4, 50-54, 104-106). The Board relied (*id.* at 51) on the statement in this Court's decision in NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956), that "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." The Board concluded that petitioners had failed to demonstrate that the rule prohibiting the employees from soliciting on the premises after their shift was necessary to maintain production or discipline (Pet. App. 52-54, 106). Accordingly, the Board held that petitioners violated Section 8(a)(1) of the Act by maintaining the no solicitation rules.

In addition, the Board found that Sparks Nugget's interrogation of employee Launius about her union activity violated Section 8(a)(1) of the Act. The Board noted that the supervisor who questioned Launius indicated his animosity to union organizing and threatened Launius with

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Union to any of said supervisors or to Carr" (*ibid.*). To be significant, the Judge concluded, "the evidence of dissatisfaction * * * must come from the employees themselves, not from the employer on their behalf" (*ibid.*).

In an effort to prove that the Union in fact no longer enjoyed majority support, Sparks Nugget sought to adduce testimony from Union Business Representative Lawrence as to whether there existed union business records demonstrating that the Union represented a majority of the unit employees. The Board rejected the proffered evidence. The Board reasoned that, since union membership was voluntary in the State of Nevada, record evidence concerning the extent of union membership would be irrelevant in determining whether a majority of employees desired union representation (Pet. App. 86). Sparks Nugget also sought to adduce testimony from a Board field examiner regarding his alleged statement to counsel for petitioners that the unfair labor practice charges were to be dismissed. The Board concluded that testimony on this subject by the field examiner fell within the evidentiary privilege protecting informal investigatory and trial preparation processes of regulatory agencies. Accordingly, the Board revoked the subpoena for the Board agent's testimony (*ibid.*).

reprisal if her union soliciting activity did not cease (Pet. App. 108). Finally the Board concluded that Sparks Nugget issued employee Dyer a reprimand because it "suspected Dyer of union activity" and wished "to deter him from continuing such activity" in violation of Section 8(a)(3) and (1) of the Act (*id.* at 109).

3. The court of appeals, relying on its prior decisions in *NLRB* v. *Tahoe Nugget, Inc.*, 584 F. 2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *Sahara-Tahoe Corp.* v. *NLRB*, 581 F. 2d 767 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); *NLRB* v. *Sierra Development Co.*, 604 F. 2d 606 (9th Cir. 1979); and *NLRB* v. *Carda Hotels, Inc.*, 604 F. 2d 605 (9th Cir. 1979), upheld the Board's decisions and enforced its orders concerning the refusal-to-bargain violations (Pet. App. 1-34). The court noted that the evidence presented in the instant cases did not differ materially from that in *Tahoe Nugget* and *Sahara-Tahoe*, and concluded that there was substantial evidence to support the Board's finding that petitioners had failed to establish a good-faith doubt as to the Union's continuing majority status (Pet. App. 9-10). The court noted that in this case, as in *Tahoe Nugget* and *Sahara-Tahoe*, some evidence was presented by the employers of employee discontent, high turnover, low membership, financial difficulty and a vigorous union membership drive. Such evidence, the court concluded, "individually or cumulatively, presents only an equivocal inference of loss of majority support for the union" (Pet. App. 9-10).[2]

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[2]The court agreed with the Board that the evidence that petitioner Sparks Nugget sought to adduce from the Board field examiner (see note 1, *supra*) was protected by the privilege preserving the confidentiality of investigative files (Pet. App. 12). The court disagreed with the Board, however, concerning petitioners' efforts to prove actual loss of majority support through Union membership records. The court reasoned that "[u]nion membership, even in a right-to-work state, is some indication of union support, though it may be only marginally relevant" (*id.* at 13; citations omitted). Nonetheless, the court concluded that the

The court of appeals also agreed with the Board's conclusion that the no-solicitation rules promulgated by petitioners were violative of Section 8(a)(1) of the Act (Pet. App. 16).[3] Finally, the court affirmed the Board's findings regarding the unlawful interrogation of employee Launius and reprimand of employee Dyer. The court concluded that as to both violations, the inferences drawn by the Board were reasonable and supported by substantial evidence on the record as a whole (*id.* at 23).

ARGUMENT

1. Petitioners' contentions regarding the refusal-to-bargain violations present the same issues that are presented in *Silver Spur Casino* v. *NLRB*, petition for cert. pending, No. 80-660 (filed Oct. 11, 1980), and that were previously before the Court in *Tahoe Nugget* and *Sahara-*

Board's ruling sustaining objections to the questioning of the Union business agent was not prejudicial. The court explained (Pet. App. 13-14; footnote omitted):

> The question asked by the respondents was whether the Union could produce any records that would demonstrate that it had the majority support of the employees * * *.
>
> If the Union had answered the question affirmatively, the Union's position would have been bolstered. If the question had been answered in the negative, that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption would not have been rebutted. Therefore, we find no error that would require a reversal.

[3]The court, however, found that the Board's orders concerning the no-solicitation rules went too far. The court explained (Pet. App. 19):

> Since the [employers] could prohibit their employees from soliciting during nonworking hours in public areas of their premises, we modify the Board's order to read that the [employers] must cease and desist from:
>
> > "maintaining any rule or regulation prohibiting its employees from soliciting on its premises during nonworking hours in non-public areas of its premises."

Tahoe, supra. Certiorari was denied in *Tahoe Nugget* and *Sahara-Tahoe* and petitioners have presented no new arguments to justify a different result here. Petitioners do not dispute the settled principle that majority support is presumed to continue following certification or voluntary recognition and that, absent unusual circumstances, the presumption is irrebuttable for one year, and thereafter may be rebutted only if the employer shows that the union was actually in the majority or that the employer had a good-faith reasonable doubt of the union's continued majority support at the time of the refusal to bargain (Pet. App. 5-6). Instead, petitioners argue that the decision of the court of appeals that the presumption was not rebutted here conflicts with other court of appeals decisions. For the reasons stated below and in our Brief in Opposition to the petition in *Silver Spur Casino* (at 8-11), petitioners' contentions are unavailing.

a. Contrary to petitioners' suggestion (Pet. 6), the court of appeals did not acknowledge a conflict with the decisions of other circuits on the basic principles described above. Rather, the court stated (Pet. App. 15 n.9) that, of the numerous cases cited to it by petitioners, three "present factual situations in which other courts may have found the presumption of majority support rebutted upon similar or weaker evidence than presented in these cases." Those three cases are factually distinguishable from the present case. In *Ingress-Plastene, Inc.* v. *NLRB*, 430 F. 2d 542, 547 (7th Cir. 1970), and *Star Mfg. Co.* v. *NLRB*, 536 F. 2d 1192 (7th Cir. 1976) (and see 220 N.L.R.B. 582, 583 (1975) (dissenting opinion of then Chairman Murphy)), unlike here, the union had been derelict in its representational duties. In *W & W Steel Co.* v. *NLRB*, 599 F. 2d 934 (10th Cir. 1979), the union's majority at the Lubbock, Texas plant was based on a seven-plant election in which all ballots were commingled. Thus the union's majority at the single plant was never

established. Here, in contrast, the Union's majority presumption was not based on the fact that the Union had shown majority support in a multi-plant or multi-employer unit, but rather on the fact that each petitioner had voluntarily recognized the Union as the representative of its employees at the time it joined the multi-employer group (Pet. App. 7 n.6, 68-71, 119-121). Moreover, in denying enforcement of the Board's bargaining order, the Tenth Circuit relied upon the fact that a predecessor company to W & W Steel had operated the plant in question at the time of the Board election and W & W Steel took control without notice of the union's presence. 599 F. 2d at 938.

Petitioners' reliance (Pet. 10-11) on *NLRB* v. *Richard W. Kaase*, 346 F. 2d 24 (6th Cir. 1965), is similarly misplaced. In that case the union's position as majority representative stemmed from an election in a multi-employer unit. Thus, the union's majority among the Kaase employees had never been established as it was here by petitioners' voluntary recognition of the Union (Pet. App. 7 n.6). See *Tahoe Nugget, Inc.* v. *NLRB, supra*, 584 F. 2d at 303 n.36.

The only issue actually presented here is whether the court below correctly concluded that substantial evidence supports the Board's findings that petitioners did not have a good-faith doubt of the Union's majority support. Further review of that fact-bound issue is not warranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[4]

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[4]Petitioners err in stating (Pet. 8) that the facts in *NLRB* v. *Alvin J. Bart & Co.*, 598 F. 2d 1267 (2d Cir. 1979), were "substantially" weaker than those here. In *Bart*, "three-fourths of the unit members signed [an] anti-union petition" (*id.* at 1272), a fact to which petitioners do not allude. Similarly, petitioners erroneously rely (Pet. 10) on *NLRB* v. *Randle-Eastern*, 584 F. 2d 720 (5th Cir. 1978), where the employer presented substantial unequivocal evidence which showed a lack of majority support. The court there acknowledged that it was a "close case" and, in finding the union's majority presumption rebutted, distinguished cases where, as here, "the [c]ompany's doubt was * * * based on 'speculative and subjective' evidence * * *." *Id.* at 729 (citations omitted).

b. Similarly, there is no merit to petitioners' assertion (Pet. 14-15) that they were barred from introducing evidence that would have demonstrated that the Union was actually lacking in majority support. As noted above (note 1, *supra*), the question asked by petitioners was whether the Union could produce any records that would demonstrate that the Union had the majority support of the employees. The court of appeals concluded (Pet. App. 13-14) that, even if the Union had answered the question in the negative, "that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption [of majority support] would not have been rebutted." The court's conclusion was plainly correct and, in any event, turns on the particular circumstances presented here.[5]

2. There is also no merit to petitioners' contention (Pet. 19-22) that Nevada's regulation of the gambling industry is a "special circumstance" that permits them to promulgate rules restricting employee solicitation on non-working time. Petitioners have failed to show how union solicitation by off-duty employees would violate either the spirit or the letter of Nevada's gaming laws or interfere with legitimate security interests.[6] The regulations cited in the petition (Pet. 22) merely concern work permits for "gaming employees" and a requirement that casinos exclude persons "of notorious or unsavory reputation" or convicted felons. Indeed,

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[5]Compare *Automated Business Systems* v. *NLRB*, 497 F. 2d 262 (6th Cir. 1974), cited by petitioners (Pet. 16), where the employer had sought to introduce affirmative evidence regarding the number of employees who had supported a decertification petition and expressed a desire not to be represented by the union.

[6]To the extent that petitioners' public service areas may justify a more restrictive no-solicitation rule, the court of appeals has already modified the Board's order to prohibit only rules banning solicitation during non-working hours in nonpublic areas (see note 3, *supra*).

under Nevada law, "gaming employee" is defined as specifically excluding "bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages" (Nev. Rev. Stat. § 463.335 (1979))—the very group of employees who are represented by the Union and are the subject of the instant litigation (Pet. App. 46, 57-58, 101). Thus, even assuming that it might be appropriate for the Board to engage in balancing or consideration of alternate means of employee communication upon an employer's making a "creditable showing of special, justifying circumstances" for a broad no-solicitation rule (*McDonnell Douglas Corp.* v. *NLRB*, 472 F. 2d 539, 545 (8th Cir. 1972)),[7] no such showing was made here. Accordingly, "this is not the occasion to balance the availability of alternative channels of communication against a legitimate employer business justification for barring * * * communications" during non-working hours in nonpublic areas of the employers' premises. *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 326 (1974).[8]

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[7]But see *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 505 (1978) ("outside of the health-care context, the availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry * * *").

[8]Petitioners also contend (Pet. 27-28 n.7) that the Board erred in finding that the interrogation of Launius was coercive. The Board's finding, however, was amply supported by evidence of expressed union hostility plus "a threat of discharge for any 'further' violation of the company's no-solicitation rule * * *" (Pet. App. 22-23, 104-105, 108). Finally, petitioners challenge (Pet. 28 n.7) the finding that employee Dyer's reprimand was unlawfully motivated. But the Board's findings were based on substantial and essentially uncontradicted evidence and were thus properly affirmed (Pet. App. 23, 107-108, 109).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 80-1083

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I.

PRIOR CASES BEFORE THIS COURT RELIED ON BY THE BOARD AND THE UNION INVOLVING NEITHER OF THE PETITIONERS NOR ISSUES PRESENTED HERE SHOULD NOT BE CONTROLLING

The Board and the Union assert that the instant cases "present the same issues"

and "the same arguments . . . already determined" in N.L.R.B. v. Tahoe Nugget, Inc., d/b/a/ Jim Kelley's Tahoe Nugget and Nevada Lodge, 584 F.2d 293 (9th Cir. 1978) cert. denied, 442 U.S. 921, and Sahara-Tahoe Corp. v. N.L.R.B., 581 F.2d 767 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979). [Bd. Brief in Opp., pp. 7-8; Union Br. in Opp., p. 3.] These assertions ignore the declaration of the Ninth Circuit that in the instant cases:

> We recognize the force of [petitioners'] contention that the Board has accorded too much weight to the presumption in these cases. This issue involves an important and difficult question which is of current national interest in the labor relations field. Respondents cite cases in other circuits which may have found the presumption rebutted upon similar or even weaker evidence than was presented in these cases. (Fn.) [The footnote cites these cases from the other Circuits.] (Emphasis added. Pet. App. p. 15).

The Ninth Circuit opinion here is at odds with eight other circuits. Several of the cases Petitioners cited in the lower

court were decided after this Court considered the Tahoe Nugget, Nevada Lodge and Sahara-Tahoe decisions, as well as these cases involve separate issues. Further, the court below "accept[ed] arguendo that a conflict exists on the issue" (Pet. App. p. 15), which was not conceded in those earlier decisions. This "important and difficult question ... of current national interest" warrants the careful attention and consideration of this Court. Tahoe Nugget, Nevada Lodge and Sahara-Tahoe should not control as different, distinct issues are presented.[1/]

1/ Justice White would have granted certiorari in Tahoe Nugget and Nevada Lodge, 442 U.S. 921. Several cases cited by the lower court here were not decided at that time. See, e.g., W & W Steel v. N.L.R.B., 599 F.2d 934 (10th Cir. 1979); see also Sahara-Tahoe Corp. v. N.L.R.B., et al., ___ F.2d ___ (9th Cir. 1980), petition pending No. 80-1452 (February 25, 1981).

By rejecting the analysis and authority of the circuit courts of appeal, the Ninth Circuit has created and conceded a clear, real and disrupting conflict among the circuits.[2/] The ill-advised attempts by the Board and Union to ignore this conflict [Bd. Br. in Opp. p. 8, Union Br. in

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2/ The Court listed those conflicting decisions in footnote 9 (Pet. App. p. 15):

> Respondents have cited cases from various circuits where the presumption of majority support was deemed rebutted. See, eg., Ingress-Plastene, Inc. v. N.L.R.B., 430 F.2d 542 (7th Cir. 1970); Star Manufacturing Co. v. N.L.R.B., 536 F.2d 1192 (7th Cir. 1976); Lodges 1746 & 743, Int'l Assn. of Mach. & Aero Workers v. N.L.R.B., 416 F.2d 809 D.C. Cir.), cert. denied, 396 U.S. 1058, 24 L.Ed.2d 752, 90 S.Ct. 751 (1970); Teamsters Local U. 769 v. N.L.R.B., 532 F.2d 1385 (D.C. Cir. 1976); National Cash Register Co. v. N.L.R.B., 494 F.2d 189 (8th Cir. 1974); National Car Rental System v. N.L.R.B., 594 F.2d 1203 (8th Cir. 1979); N.L.R.B. v. Alvin J. Bart & Co., Inc. 598 F.2d 1267 (2d Cir. 1979); W & W Steel Co. v. N.L.R.B. 599 F.2d 934 (10th Cir. 1979); Automated Business Systems v. N.L.R.B.,

Union Br. in Opp. p. 3-4] also confirm its existence.

Even the dissent in W & W Steel, which the lower court, Board and Union failed to distinguish, recognized (at 599 F.2d 942, n. 4) the conflict created by the Ninth Circuit, "acknowledg[ing] that this presumption has not received universal acclaim", citing N.L.R.B. v. Tahoe Nugget, supra. Further, the presumption flys in the face of the "prevailing statutory policy" mandated by the Court in N.L.R.B. v. Iron Workers Local No. 103, 434 U.S. 335 (1978) that unions cannot have" "the power to completely frustrate employee realization of the premise of the Act--that its

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2/ Cont'd. from p. 4

497 F.2d 262 (6th Cir. 1974); N.L.R.B. v. Nu-sourthern Dyeing & Finishing, Inc., 444 F.2d 11 (4th Cir. 1971); N.L.R.B. v. Randall-Eastern Ambulance Service, Inc. 584 F.2d 720 (5th Cir. 1978).

prohibitions will go far to assure freedom of choice and majority rule in employee selections of representatives." [Cite omitted] 434 U.S. at 344.[3/] In sum, the conflict which the lower court concedes, and the Board and Union gloss over, is an important and recurring one which this Court should resolve to maintain uniformity among the circuits in a major area of national labor relations and federal labor policy.

II.

THE NEVADA GAMING CONTROL ACT WARRANTS PETITIONERS' BROAD NO-SOLICITATION RULES

The Board and Union assert that "bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages" do not fit the definition

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3/ The Board and Union failed to oppose Petitioners' arguments regarding N.L.R.B. v. Iron Workers Local No. 103, supra (Pet. p. 7-8).

of "gaming employee" under Nevada law [Nev. Rev. Stat. § 463.335(1)(a) (1979)]. Thus, they contend Petitioners' arguments regarding no-solicitation rules are without merit. (Bd. Br. in Opp. p. 10-11, Union Br. in Opp. 11-12). These assertions ignore, or at least miss the point. Petitioners do not urge that the employees purportedly represented by the Union are "gaming employees" but rather submit that under the Nevada Gaming Control Act Petitioners are obligated to police their establishments "to prevent incidents" such as solicitations by off-shift employees who, as a part of the public, are subject to Petitioners' no-solicitation rules, as well as the Nevada Gaming laws. [Gaming Control Act, Chapter 463.151(3), Regulation 5.011(1)]. Those rules are established in the interest of the health, safety and morals of the State of Nevada, which interests this Court has

held that states can regulate when, as here, "an overriding state interest" (i.e. regulation of the gaming industry) exists. See, San Diego Trades Council v. Garmon, 359 U.S. 243 (1959); Teamsters, Local 24 v. Oliver, 358 U.S. 283 (1959).

Petitioners' rules, based on the State's regulations, only constrict the organizational rights of off-shift employees who the Board and the courts have indicated should be treated as nonemployee solicitors. GTE Lenkurt, Inc., 204 NLRB 921 (1973); Diamond Shamrock Co.v. N.L.R.B., 443 F.2d 52 (3rd Cir. 1971). This Court has recently upheld a state court application of state trespassing laws even though those laws had some limiting effect on the arguably protected organizational rights of nonemployees. Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978).

In short, the Board and/or the Court

below should have deferred to the Nevada Gaming statutes and regulations, and thereby determined that "special circumstances" exist which authorize Petitioners' promulgation and implementation of their no-solicitation rules. Republic Aviation Corporation v. N.L.R.B., 324 U.S. 793 (1945), N.L.R.B. v. Beth Israel Hospital, 437 U.S. 483 (1978).

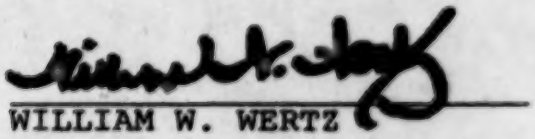
III.

CONCLUSION

The issues raised by Petitioners are constantly recurring ones affecting federal labor law and policy. Further, the conflict existing among the circuits presents a confused state of national labor relations law and policy administration on these issues, which should not be allowed to continue by the happenstance of the

circuit court involved, but rather should be settled by clear, final resolution by this Court.

Respectfully submitted,



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